

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(1) DEFINITION AND NATURE OF A DEED/(i) At Common Law/1. Common law definition of a deed.

## **DEEDS AND OTHER INSTRUMENTS (**

### **1. DEEDS**

#### **(1) DEFINITION AND NATURE OF A DEED**

##### **(i) At Common Law**

##### **1. Common law definition of a deed.**

At common law, for an instrument to be a deed it must comply with the following requirements<sup>1</sup>. First, it must be written on parchment or paper<sup>2</sup>. Secondly, it must be executed in the manner specified below by some person or corporation named in the instrument. Thirdly, as to subject matter, it must express that the person or corporation so named makes, confirms, concurs in or consents to some assurance (otherwise than by way of testamentary disposition) of some interest in property or of some legal or equitable right, title, or claim, or undertakes or enters into some obligation, duty or agreement enforceable at law or in equity, or does or concurs in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation<sup>3</sup>.

To be executed by a party as his deed, the instrument must be sealed with a seal which is, or can be regarded as, his seal<sup>4</sup>, and must be delivered as his act and deed<sup>5</sup>. An individual, that is a party not a corporation, executing a deed after 1925 must also either sign or place his mark on it; sealing and delivery alone are insufficient execution by such a party<sup>6</sup>. Delivery by a party is constituted by any words or conduct expressly or impliedly acknowledging that he intends to be bound immediately and unconditionally by the provisions of the deed<sup>7</sup>.

Several classes of instrument under seal do not comply with all these requirements and are not therefore deeds. These classes include testamentary instruments executed, unusually, under seal; instruments certifying or recording a pre-existing legal status, relationship or position but not confirming some specific assurance; and instruments which are binding and effective before sealing or before delivery so that delivery, in the technical sense defined above, is superfluous and cannot meaningfully be accomplished as a separate or distinct step (and sealing also may have been superfluous). Thus the following documents, although sealed, are not deeds: a will<sup>8</sup>, an award<sup>9</sup>, a certificate of admission to a learned society<sup>10</sup>, a certificate of shares or stock or a share warrant to bearer<sup>11</sup>, an agreement signed by directors and sealed with the company's seal<sup>12</sup>, a licence to use a patented article<sup>13</sup>, letters of ordination<sup>14</sup>.

A power of attorney under seal is a deed<sup>15</sup>, and so is a transfer of land to which title is registered<sup>16</sup>.

Any document which does not comply with all the requirements for a deed may nevertheless, if it complies with the relevant requisites for an instrument under hand, be effective as such an instrument, even though it was intended to be a deed<sup>17</sup>.

1 As to the modification of the common law rules by the Law of Property (Miscellaneous Provisions) Act 1989 see PARA 7 post. As to the statutory requirements for instruments executed as deeds after 31 July 1990 see PARA 8 post.

2 As from 31 July 1990, any rule of law which restricts the substances on which a deed may be written is abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(a); and PARAS 2, 7 post.

3 *Goddard's Case* (1584) 2 Co Rep 4b at 5a; Co Litt 35b, 171b; Spelman's Glossary sv Factum; Termes de la Ley sv Fait; Shep Touch 50-51; 2 Bl Com (14th Edn) 295-343; *R v Fauntleroy* (1824) 2 Bing 413 at 423-424, 428; *Hall v Bainbridge* (1848) 12 QB 699; *R v Morton* (1873) LR 2 CCR 22 at 27; *IRC v Angus* (1889) 23 QBD 579 at 582, CA.

4 As from 31 July 1990, any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b); and PARAS 7, 27, 32 post. As to the application of s 1(1)(b) see s 1(9); and PARA 7 text and note 4 post.

5 See PARA 31 post. As to delivery under the Law of Property (Miscellaneous Provisions) Act 1989 see PARA 34 post.

6 See PARA 30 post.

7 See PARA 31 post.

8 *R v Morton* (1873) LR 2 CCR 22 at 27. If an instrument under seal is so expressed as to take effect only in case of death it may be exclusively a testamentary instrument and thus not a deed: see eg *Hawksby v Kane* (1913) 47 ILT 96.

9 *Dod and Herbert* (1655) Sty 459; *Brown v Vawser* (1804) 4 East 584; *R v Morton* (1873) LR 2 CCR 22.

10 *R v Morton* (1873) LR 2 CCR 22.

11 *R v Morton* (1873) LR 2 CCR 22; *Hibblewhite v M'Morine* (1840) 6 M & W 200 at 214; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496 at 503.

12 *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5.

13 *Chanter v Johnson* (1845) 14 M & W 408.

14 *R v Morton* (1873) LR 2 CCR 22.

15 *R v Lyon* (1813) Russ & Ry 255; *R v Fauntleroy* (1824) 2 Bing 413; *R v Morton* (1873) LR 2 CCR 22; and see AGENCY vol 1 (2008) PARAS 15-16.

16 *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853 at 857, [1951] 2 All ER 250 at 252 per Vaisey J.

17 See *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, [1961] 1 All ER 277, CA; *Byblos Bank SAL v Al Khudhairi* [1987] 1 FTLR 35, [1987] BCLC 232, CA.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(1) DEFINITION AND NATURE OF A DEED/(i) At Common Law/2. Material, language and writing.

## **2. Material, language and writing.**

At common law, a deed is required to be written on paper or on parchment or vellum, and not on any other substance<sup>1</sup>. A sealed writing inscribed on any other substance, as on wood, stone, slate, linen, cloth, leather, or steel, cannot take effect as a deed<sup>2</sup>. A deed may be written in a book<sup>3</sup>. It may be written in any language and in any character<sup>4</sup>; and it is not necessary that the writing be done with pen and ink; it may be executed in pencil or with paint, in print, by engraving, lithography or photography, or in any other mode of representing or reproducing visible words<sup>5</sup>.

1 *Goddard's Case* (1584) 2 Co Rep 4b at 5a; Co Litt 35b, 229a; 2 Co Inst 672; Shep Touch 50, 52, 54; 2 Bl Com (14th Edn) 297. As from 31 July 1990, any rule of law which restricts the substances on which a deed may be written is abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(a); and PARA 7 post.

2 YB 25 Edw 4, 83, pl 9; YB 44 Edw 3, 21, pl 23; YB 12 Hen 4, 23, pl 3; YB 27 Hen 6, 9, pl 1; Fitzherbert's Grand Abridgement, Fines, 116; Fitz Nat Brev 122, l; Co Litt 35b, 229a.

3 *Fox v Wright* (1598) Cro Eliz 613.

4 Shep Touch 54-55; 2 Bl Com (14th Edn) 297.

5 See *Geary v Physic* (1826) 5 B & C 234 at 237; and cf the meaning of 'writing' in the Interpretation Act 1978 s 5, Sch 1 (see SALE OF LAND vol 42 (Reissue) PARA 39). For the authorities as to mode of signature see SALE OF LAND vol 42 (Reissue) PARA 40.

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### 3. Kinds of deed.

Deeds are either deeds poll or indentures<sup>1</sup>. A deed poll is a deed made by and expressing the active intention of one party only, or made by two or more persons joining together in expressing a common active intention of them all. A deed poll is so called because the parchment required for such deeds has usually been shaved even or polled at the top. An indenture is a deed to which two or more persons are parties, and which evidences some act or agreement between them other than the mere consent to join in expressing the same active intention on the part of all. An indenture derives its name from the fact that the parchment on which such a deed was written was indented or cut with a waving or indented line at the top<sup>2</sup>.

A deed executed after 1 October 1845, and purporting to be an indenture, has the effect of an indenture, though not actually indented or expressed to be an indenture<sup>3</sup>. A deed, whether or not it is an indenture, may now be described (at its commencement or otherwise) as a deed simply or by a name, such as conveyance, settlement, or mortgage, indicating the nature of the transaction intended to be effected<sup>4</sup>. Hence the terms 'indenture' and, except in certain instances, 'deed poll' have passed out of use<sup>5</sup>.

Deeds are also divided into two classes by the distinction, drawn for instance for purposes of enforcement<sup>6</sup>, between a deed inter partes and a deed not inter partes. A deed inter partes is a deed which expressly states that it is made between two or more named persons. All deeds inter partes now have the effect of indentures, whether or not indented or expressed to be indentures<sup>7</sup>.

1 Littleton's Tenures ss 218, 370-377; Co Litt 35b; Shep Touch 50.

2 Co Litt 229a and n (1); Shep Touch 50; 2 Bl Com (14th Edn) 295-296. The practice of indenting originated in early times, when deeds were short and two or more copies were written on one piece of parchment with some words in between, and each part was cut off in a waving or uneven line, which might afterwards show that it tallied with the other part or parts.

3 Law of Property Act 1925 s 56(2) (replacing the Real Property Act 1845 s 5 (repealed)).

4 Law of Property Act 1925 s 57.

5 It is the same with 'these presents', which was formerly used in any reference to the deed in the body of the deed itself, but the expression is now in practice replaced by 'this deed'.

6 See PARAS 61, 66 post.

7 Law of Property Act 1925 ss 56(2), 57.

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#### **4. Execution in duplicate.**

Where a deed inter partes is executed in duplicate, or in more parts than one, so that each party entitled under it may possess an example of the deed, all the parts are regarded as one deed in law and each part is as efficacious as the other or others<sup>1</sup>. Where one part is executed by the grantor, or assesor, or person undertaking some obligation under the deed, and the other by the grantee, alienee, or person taking the benefit of that obligation, the former part is called the principal deed and the other the counterpart, and in case of inconsistency the counterpart must in general give way<sup>2</sup>; but where all parties execute each part, each part is equally the principal deed<sup>3</sup>.

1 YB 38 Hen 6, 25, pl 1; Littleton's Tenures s 370; Co Litt 229a; Shep Touch 52-53; *Pearse v Morrice* (1832) 3 B & Ad 396; *Burchell v Clark* (1876) 2 CPD 88 at 96, CA; and see PARA 3 note 2 ante.

2 Shep Touch 53; *Burchell v Clark* (1876) 2 CPD 88 at 93-94, 97, CA; *Matthews v Smallwood* [1910] 1 Ch 777 at 784; and see *Trusthouse Forte Albany Hotels Ltd v Daejan Investments Ltd (No 2)* [1989] 2 EGLR 113, [1989] 30 EG 87, CA. Where, however, there is a patent ambiguity in the principal instrument, eg a lease, it may be explained by reference to the counterpart: *Burchell v Clark* supra; *Matthews v Smallwood* supra at 785. Each part is primary evidence of the contents of the deed against the party executing it and his privies; it is secondary evidence only against the non-executing party and his privies (except where used only to prove an ancient act of possession): *Barber v Rowe* [1948] 2 All ER 1050, CA; and see CIVIL PROCEDURE vol 11 (2009) PARAS 763, 880. As to leases and counterparts of leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 111 et seq.

3 2 Bl Com (14th Edn) 296.

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## **5. Formal parts of a deed.**

In modern conveyancing practice the chief formal parts of a deed are: the words describing the instrument (whether conveyance, settlement, mortgage, or otherwise); the date; the parties' names; the recitals stating the facts on which the act to be evidenced by the deed is grounded; the testatum or witnessing part containing the operative words which express the parties' intention; and the testimonium stating that the parties have sealed the deed in witness of what is written therein.

Further, in assurances of property, the testatum usually contains the following subsidiary formal parts: the parcels or description of the property to be conveyed; the habendum defining the estate or interest to be taken by the alienee; the trusts, if any, imposed on the person taking the legal estate under the deed; and the covenants, if any, entered into by the alienor or alienee. In an assurance of land all that part which precedes the habendum, including the parties' names, the recitals, if any, and the operative words, is called the premises<sup>1</sup>. There are also several formal clauses appropriate to deeds of particular kinds. Thus mortgage deeds contain a proviso for cesser of the mortgage term or for redemption<sup>2</sup>, leases at a rent contain a reddendum specifying the rent reserved, and a proviso or condition of re-entry, and settlements contain a variety of trusts and powers always expressed in well-drawn deeds in formal language. In a settlement of land under the Settled Land Act 1925 two deeds were required, the vesting deed and the trust instrument, and the vesting deed had to conform to certain statutory requirements<sup>3</sup>. As from 1 January 1997<sup>4</sup> it is no longer possible to create a new settlement under the Settled Land Act 1925<sup>5</sup>.

1 Co Litt 6a, 229b; Shep Touch 75; 2 Bl Com (14th Edn) 298.

2 A legal mortgage can now be created only by demise (in a leasehold mortgage by sub-demise) subject to a proviso for cesser of the mortgage term, or by a charge by deed expressed to be by way of legal mortgage: see the Law of Property Act 1925 ss 85-87 (as amended); and MORTGAGE vol 77 (2010) PARAS 187-188, 190-191.

3 See the Settled Land Act 1925 ss 4(1), 5(1); and SETTLEMENTS vol 42 (Reissue) PARAS 688-690.

4 I.e. the date on which the Trusts of Land and Appointment of Trustees Act 1996 came into force: see s 27(2).

5 See *ibid* s 2; and SETTLEMENTS vol 42 (Reissue) PARA 676. As to the limited exceptions see s 2(2), (3); and SETTLEMENTS vol 42 (Reissue) PARA 676.

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## 6. Method of framing deeds.

Conveyancers adhere by common consent to the traditional method of framing deeds, construct them with the usual formal parts and use the established common forms. Provided, however, that the language used in the deed expresses the parties' intention with reasonable certainty<sup>1</sup>, the deed will take effect at law, notwithstanding that it is not drawn with the usual formal parts or in accordance with the established conveyancing practice<sup>2</sup>. On the other hand, where any rule of law requires the use of any particular or technical words to carry out the parties' intention, as in the case of the limitation of an estate of inheritance in fee tail in any lands or hereditaments<sup>3</sup>, the necessary words must of course be employed<sup>4</sup>. Deeds, whether deeds poll or indentures, may be expressed either in the first or in the third person<sup>5</sup>.

All instruments delivered as deeds after 31 July 1990 must comply with the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 in order to be valid deeds<sup>6</sup>.

1 *Re Arden, Short v Camm* [1935] Ch 326 at 333 per Clauson J; and see PARA 172 note 3 post.

2 *Co Litt* 7a; 2 Bl Com (14th Edn) 297-298; *R v Wooldale Inhabitants* (1844) 6 QB 549.

3 Littleton's Tenures s 1; and see the Law of Property Act 1925 s 130 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); REAL PROPERTY vol 39(2) (Reissue) PARAS 118-119. The amendments and repeals made by the Trusts of Land and Appointment of Trustees Act 1996 do not affect any entailed interest created before 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 came into force: see s 27(2)): s 25(4). As from 1 January 1997 it is no longer possible to grant an entailed interest see s 2, Sch 1 para 5; and SETTLEMENTS vol 42 (Reissue) PARA 677. An estate in tail is an equitable interest only: see the Law of Property Act 1925 s 1(1), (3). Words of limitation of an estate in fee simple were formerly required, but are not now necessary: see s 60 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 93.

4 *Re Whiston's Settlement, Lovatt v Williamson* [1894] 1 Ch 661; *Re Ethel and Mitchells and Butlers' Contract* [1901] 1 Ch 945; *Re Irwin, Irwin v Parkes* [1904] 2 Ch 752; *Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469, CA. Words of limitation were held not to be essential in an appointment of real and personal estate in *Re Nutt's Settlement, McLaughlin v McLaughlin* [1915] 2 Ch 431.

5 Littleton's Tenures ss 371-373; *Shep Touch* 50-51. As to deeds poll and indentures see PARA 3 ante.

6 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2) (as amended); and PARA 7 post. As to the application of s 1(2) (as amended) see s 1(9); and PARA 7 text and note 4 post.

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## **(ii) The Law of Property (Miscellaneous Provisions) Act 1989**

### **7. Deeds and their execution.**

The common law rules relating to deeds<sup>1</sup> have been considerably modified by the Law of Property (Miscellaneous Provisions) Act 1989<sup>2</sup>. However, nothing in this provision relating to deeds and their execution<sup>3</sup> applies in relation to instruments delivered as deeds before 31 July 1990<sup>4</sup>. The Act abolishes any rule of law which: (1) restricts the substances on which a deed may be written<sup>5</sup>; or (2) requires a seal for the valid execution of an instrument as a deed by an individual<sup>6</sup>; or (3) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed<sup>7</sup>.

1 See PARA 1 et seq ante.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended); the text and notes 3-7 infra; and PARA 8 post.

3 *Ibid* s 1 (as amended): see s 1(11).

4 *Ibid* s 1(11). This is the date on which s 1 (as originally enacted) came into force: Law of Property (Miscellaneous Provisions) Act 1989 (Commencement) Order 1990, SI 1990/1175. Nothing in the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (2), (3), (7) or (8) (s 1(2), (3) as amended) applies in relation to deeds required or authorised to be made under: (1) the seal of the county palatine of Lancaster; (2) the seal of the Duchy of Lancaster; or (3) the seal of the Duchy of Cornwall: s 1(9). The references in s 1 (as amended) to the execution of a deed by an individual do not include execution by a corporation sole: see s 1(10); and PARA 32 text to note 3 post. As to corporations sole see CORPORATIONS.

5 *Ibid* s 1(1)(a). The common law rule was that a deed must be written on paper, parchment or vellum and not on any other substance: see PARA 2 ante.

6 *Ibid* s 1(1)(b). See PARAS 27, 32 post.

7 *Ibid* s 1(1)(c). See PARA 34 post.



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## **8. Statutory definition of a deed.**

From 31 July 1990<sup>1</sup> an instrument may not be a deed unless: (1) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed<sup>2</sup> as a deed or otherwise)<sup>3</sup>; and (2) it is validly executed as a deed by that person or a person authorised to execute it in the name or on behalf of that person, or by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties<sup>4</sup>.

<sup>1</sup> The date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 ante.

<sup>2</sup> 'Sign' in relation to an instrument includes an individual signing the name of the person or party on whose behalf he executes the instrument, and making one's mark on the instrument; and 'signature' is to be construed accordingly: *ibid* s 1(4) (amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, s 10(1), Sch 1 paras 13, 14).

<sup>3</sup> Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(a). For the purposes of s 1(2)(a), an instrument is not to be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal: s 1(2A) (added by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 8). As to the application of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2) (as amended) see s 1(9); and PARA 7 text and note 4 ante.

<sup>4</sup> *Ibid* s 1(2)(b) (substituted by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 7(3)). See note 3 *supra*.

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### **(iii) Electronic Conveyancing**

#### **9. Electronic dispositions.**

The Land Registration Act 2002 contains provisions enabling electronic conveyancing, and when all the necessary implementing subordinate legislation has been made it will be compulsory for registered land conveyancing (including all land contracts and transfers) to be conducted electronically<sup>1</sup>. In the context of dispositions required by the Act to be conducted electronically<sup>2</sup>, there are a number of conditions, requirements and other formalities, which apply equally to deeds under seal and to agreements made under hand<sup>3</sup>.

A document to which the relevant provisions apply<sup>4</sup> will be regarded as in writing and signed by each individual and sealed by each corporation whose electronic signature it has<sup>5</sup>. Such a document is to be regarded for the purposes of any enactment as a deed<sup>6</sup>.

1 See the Land Registration Act 2002 Pt 8 (ss 91-95) (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1049 et seq.

2 See *ibid* s 91 (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1051.

3 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 1051.

4 *le ibid* s 91 (as amended): see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1051.

5 See *ibid* s 91(4); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1051.

6 See *ibid* s 91(5); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1051.

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## **(2) WHEN A DEED IS NECESSARY**

### **(i) At Common Law**

#### **10. Conveyance of incorporeal hereditaments.**

A deed is necessary for every transaction which the common law requires to be evidenced by writing<sup>1</sup>.

Hence at common law a deed is necessary to make a grant or any other conveyance taking effect between living persons of any incorporeal hereditament<sup>2</sup>, or any estate or interest therein, including a chattel interest such as a lease for years of an incorporeal hereditament<sup>3</sup>. This is equally the case whether the grant enures by way of the original creation of some incorporeal hereditament which did not exist before, as in the case of the grant de novo of an easement<sup>4</sup>, a profit à prendre (such as the right of killing and taking away game or fish<sup>5</sup>) or a rent<sup>6</sup>, or whether the grant takes effect as a transfer of some existing incorporeal hereditament or any estate or interest therein, as where an assignment is made of a rentcharge in fee previously created<sup>7</sup> or where a lease for years of some incorporeal hereditament already existing is made, assigned, or surrendered<sup>8</sup>.

1 Littleton's Tenures ss 183, 217, 250, 252, 358-367, 541-542, 551, 618, 628; Co Litt 9b, 49a, 85a, 121b, 143a, 169a, 172a, 307a, 338a. The reason for this is that by the common law a man's writing was required to be authenticated by his seal: see PARA 59 note 1 post.

2 See eg *Bryan v Whistler* (1828) 8 B & C 288, where it was considered that an exclusive right of burial was a grant of an incorporeal hereditament which to be effectual would need to be granted by deed.

3 Littleton's Tenures ss 183, 551-569, 618, 627-628; Co Litt 9a, b, 42a, 85a, 121a, b, 172a, 307a, 332a, 335b; Shep Touch 227-230; 2 Bl Com (14th Edn) 317. As to the purposes for which a deed is required by statute see PARA 14 post. As to the effect of an agreement specifically enforceable to grant some incorporeal hereditament see PARA 26 post. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 73 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 232 et seq.

4 *Hewlins v Shippam* (1826) 5 B & C 221; *Bryan v Whistler* (1828) 8 B & C 288; *Cocker v Cowper* (1834) 1 Cr M & R 418; *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940 at 967, Ex Ch; *Proud v Bates* (1865) 34 LJ Ch 406 at 411; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; and see *May v Belleville* [1905] 2 Ch 605 at 612. As to easements see EASEMENTS AND PROFITS A PRENDRE.

5 *Wickham v Hawker* (1840) 7 M & W 63 at 76-79; *Ewart v Graham* (1859) 7 HL Cas 331 at 334-335; *Hooper v Clark* (1867) LR 2 QB 200; *Adams v Clutterbuck* (1883) 10 QBD 403 at 405. See also *Lowe v Adams* [1901] 2 Ch 598. As to profits à prendre see EASEMENTS AND PROFITS A PRENDRE.

6 Littleton's Tenures s 218; Co Litt 144a, 160a. See RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 777 et seq.

7 Littleton's Tenures ss 556, 616, 618, 627; Co Litt 9a, b, 172a. At common law an existing rentcharge could not be granted over without the attornment of the terre tenant (Littleton's Tenures s 556), but by the Administration of Justice Act 1705 s 9 (now replaced by the Law of Property Act 1925 s 151(1)), the necessity of attornment was abolished.

8 *Lincoln College Case* (1595) 3 Co Rep 53a at 58b, 62b, 63a; Co Litt 85a, n (2), 338a; *Hewlins v Shippam* (1826) 5 B & C 221 at 228-233; *Duke of Somerset v Fogwell* (1826) 5 B & C 875 at 886; *Bird v Higginson* (1835) 2 Ad & El 696 at 704 (affd (1837) 6 Ad & El 824, Ex Ch); *Wood v Leadbitter* (1845) 13 M & W 838 at 842-843; *Thomas v Fredricks* (1847) 10 QB 775 at 783.

A deed was equally necessary for the conveyance of such incorporeal hereditaments as a reversion or remainder expectant on an estate tail, for life or for years, in land as for the assurance of purely incorporeal hereditaments (Littleton's Tenures ss 515 et seq, 553, 567-573, 578, 618, 627; Co Litt 49a, 172a, 315b, 332a; Shep Touch 230; 2 Bl Com (14th Edn) 310; *Doe d Were v Cole* (1827) 7 B & C 243 at 248; and see *Haggerston v Hanbury* (1826) 5 B & C 101; and the Real Property Act 1845 s 6 (repealed)); but now a reversion or remainder expectant on an estate tail or for life is an equitable interest only, though there can still be a legal reversion on a term of years (see the Law of Property Act 1925 s 1(1), (3)). As to conveyances of legal estates see PARAS 14-15 post; and as to dispositions of equitable interests see PARAS 24-25 post.

A deed was also in general necessary at common law to attach to an inter vivos assurance of a freehold estate any condition operating in defeasance of the estate: see Littleton's Tenures ss 365-369; Co Litt 225a, b, 226b, 228a, b; Shep Touch 119-120. Except as provided by the Law of Property Act 1925 s 7(1), (2) (s 7(1) as amended), defeasible freehold estates can no longer exist as legal estates, and any such condition will create equitable interests and may be imposed by any means by which an equitable interest in land may be created: see s 1(1), (3); and PARA 24 post.

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## 11. Right to enter on land.

At common law the right to enter upon land and to remain there for a certain time can only be effectually given by deed, unless the grant of that right is coupled with a grant, which is valid without deed, of something on the land<sup>1</sup>. Thus a grant made without deed, although for valuable consideration, of the right to enter upon certain land belonging to the grantor on specified days and to remain there during certain hours of each day (during which races are to be held), since it purports to exceed the privilege given by a mere licence and to confer an interest in the land, is ineffective to do so at common law<sup>2</sup>. If, however, a man has a flock of sheep in his field, and without deed sells to another all the wool on the sheep, together with the right to go into the field and to shear the sheep there, the buyer would have a valid legal right to enter upon the field and to stay there until he had finished the shearing<sup>3</sup>.

In equity, and consequently now in any court having jurisdiction to grant equitable remedies, a licence to go upon land granted by contract for valuable consideration may, as a matter of construction of the contract, be irrevocable, and in such a case the licensor (even if the contract was not under seal) will be restrained by injunction from revoking the licence in breach of contract or from acting on such a revocation if made<sup>4</sup>. Moreover, if the licensor revokes the licence, he nevertheless cannot obtain equitable assistance to evict the licensee in aid of his breach of contract<sup>5</sup>. Further, under the doctrine of proprietary estoppel<sup>6</sup>, if an equity is made out in appropriate cases it may be satisfied by conferring a licence to enter land. The terms of the licence will vary according to the circumstances<sup>7</sup>.

1 *Wood v Leadbitter* (1845) 13 M & W 838 at 845, 853. See also *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384 at 402, [1959] 2 All ER 651 at 659, CA, per Lord Evershed MR (a right to pass effluent through another's land is a proprietary right which is not capable of grant other than by deed).

2 *Wood v Leadbitter* (1845) 13 M & W 838. At law such a grant amounts to a mere licence to go on the land, and is revocable accordingly. A contract for the sale or other disposition of an interest in land is to be made in writing: see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); para 145 post; and SALE OF LAND vol 42 (Reissue) PARAS 29-40. As regards licences, whether coupled with an interest or not, and the distinction between a licence and a leasehold interest see LANDLORD AND TENANT.

3 *Wood v Manley* (1839) 11 Ad & El 34; *Wood v Leadbitter* (1845) 13 M & W 838. It appears that if there were a mere gift of the wool, coupled with such right of entry as mentioned in the text, no valid legal right of entry and remaining on the land would be conferred, but only a revocable licence, since gifts of chattels cannot be well made, where there is no delivery of possession, without deed: see PARA 13 post.

4 *Millennium Productions Ltd v Winter Garden Theatre (London) Ltd* [1946] 1 All ER 678, CA; revsd on other grounds sub nom *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL. In appropriate cases, the licensee may obtain specific performance of a contractual licence: *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA. See further CONTRACT vol 9(1) (Reissue) PARA 981.

5 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326.

6 See ESTOPPEL vol 16(2) (Reissue) PARAS 1089-1094.

7 See *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA (licence for as long as the plaintiff desires); *Greasley v Cooke* [1980] 3 All ER 710, [1980] 1 WLR 1306, CA (licence for as long as the defendant wished); *Re Sharpe (a bankrupt), ex p the trustee of the bankrupt v Sharpe* [1980] 1 All ER 198, [1980] 1 WLR 219 (licence until the loan was repaid).

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## 12. Release.

An express release, whether of a right in any lands, tenements or hereditaments, goods or chattels<sup>1</sup>, or of any real or personal action, claim or demand, can only be made at common law by deed<sup>2</sup>. Thus an express discharge given without valuable consideration of any obligation arising from a breach of contract (such as a debt<sup>3</sup>), or from a wrong<sup>4</sup>, must always be made by deed<sup>5</sup>. As a rule an obligation arising (before breach) under a contract executed by the other party to the contract, such as a promise to pay on a future day for goods delivered or money lent in consideration of that promise, can only be discharged, without valuable consideration, by deed<sup>6</sup>.

1 It appears that normally an express release of right in goods or chattels must be made by deed: *Jennor and Hardie's Case* (1587) 1 Leon 283 per Anderson CJ; 3 Preston's Abstracts of Title (2nd Edn) 118; and see note 2 infra. In modern law, however, where goods are in the possession of a bailee, the owner may well make a gift of them to the bailee by word of mouth only even though such a gift may appear to be in the nature of a release of right. This is because the change, which takes place in the bailee's possession when he ceases to hold the goods as bailee and begins to keep them as owner, is equivalent to actual delivery of the possession of the goods at the time of the gift: see *Winter v Winter* (1861) 9 WR 747; *Kilpin v Ratley* [1892] 1 QB 582; *Cain v Moon* [1896] 2 QB 283. On this ground it appears that a similar gift may be made to a finder or taker of goods who is in possession of them: *Shep Touch* 240-241.

2 Littleton's Tenures ss 444 et seq; Co Litt 264b; *Shep Touch* 320-321, 323; and see *Lampet's Case* (1612) 10 Co Rep 46b at 48a, b; *Jennor and Hardie's Case* (1587) 1 Leon 283; 3 Chitty on Pleading (7th Edn) 112-113, 313. See also *Bank of Credit and Commerce International SA (in liquidation) v Ali* [1999] 2 All ER 1005.

3 *Pinnel's Case* (1602) 5 Co Rep 117a, b; *Edwards v Weeks* (1677) 2 Mod Rep 259; *May v King* (1701) 12 Mod Rep 537; *Reeves v Brymer* (1801) 6 Ves 516; *Cross v Sprigg* (1849) 6 Hare 552; *Edwards v Walters* [1896] 2 Ch 157 at 168, CA.

4 See note 3 supra.

5 An express release of a debt or of the liability to pay damages is of no effect in equity, if not made by deed, unless it is given for valuable consideration (*Edwards v Walters* [1896] 2 Ch 157, CA) or can take effect under the doctrine of promissory estoppel (*Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL). See further CONTRACT vol 9(1) (Reissue) PARAS 1030-1035, 1052.

6 *Blackhead v Cock* (1614) 1 Roll Rep 43 at 44; *Foster v Dawber* (1851) 6 Exch 839 at 851; *Edwards v Walters* [1896] 2 Ch 157, CA. The only exception is that a bill of exchange or promissory note is discharged if the holder, at or after the maturity, absolutely and unconditionally renounces his rights against the acceptor or maker, provided that the renunciation is in writing, or the bill or note is delivered up to the acceptor or maker: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1555.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(i) At Common Law/13. Further instances in which a deed is required.

### 13. Further instances in which a deed is required.

At common law, a deed was required for any power of attorney authorising the attorney to execute a deed or to deliver seisin on the principal's behalf<sup>1</sup>. There are now statutory provisions in relation to the execution of powers of attorney<sup>2</sup>, and any rule of law which requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed has been abolished<sup>3</sup>.

Formerly a corporation aggregate could, as a general rule, only bind itself by deed, which would have been executed under its corporate seal<sup>4</sup>. But, in consequence of the Corporate Bodies' Contracts Act 1960, a deed is no longer required for the making, variation or discharge on or after the 29 July 1960 of a contract by a body corporate, other than a company within the Companies Act 1985<sup>5</sup>, whether the body corporate gave its authority before or after that date<sup>6</sup>.

Gifts or gratuitous assignments of choses or things in possession (that is, of tangible goods) must, if not accompanied by delivery of possession, be made by deed<sup>7</sup>.

It appears that by the common law a deed is required for the assignment of the benefit of letters patent conferring the privilege of the exclusive use of an invention<sup>8</sup>.

1 Co Litt 52a; Shep Touch 217; 1 Preston's Abstracts of Title (2nd Edn) 293; *Steiglitz v Egginton* (1815) Holt NP 141; *Berkeley v Hardy* (1826) 5 B & C 355. The rule is also recognised in equity: see *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 563, 566, CA; *Re Seymour, Fielding v Seymour* [1913] 1 Ch 475 at 481, CA, per Joyce J. Where an intended deed has already been signed and sealed, an authority to deliver it and so complete its execution needs a deed: *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 88, [1960] 2 All ER 568; revsd on another point [1961] Ch 375, [1961] 1 All ER 277, CA. See further PARA 27 note 11 post. It does not appear that an authority to do any other act than the execution of a deed or the delivery of seisin is required to be given by deed. Thus a power for the assignee of a chose or thing in action to sue at law in the assignor's name was not required to be given by deed: *Howell v MacIvers* (1792) 4 Term Rep 690; *Pickford v Ewington* (1835) 4 Dowl 453; *Mangles v Dixon* (1852) 3 HL Cas 702 at 726. An authority to enter on the principal's behalf into any contract not requiring a deed may well be given without deed (see Sugden, Vendors and Purchasers (14th Edn) 145; *Rosenbaum v Belson* [1900] 2 Ch 267); and an authority to sign any document other than a deed on the principal's behalf need not be given by deed (*R v Kent Justices* (1873) LR 8 QB 305 at 307; *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA; *Sims v Landray* [1894] 2 Ch 318). See further PARA 47 post.

2 See the Powers of Attorney Act 1971 s 1 (as amended); and see AGENCY vol 1 (2008) PARA 16. As to deeds executed by attorney see PARA 47 post.

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(c). This provision does not apply to instruments delivered as deeds before 31 July 1990 (ie the date on which s 1 came into force): see s 1(11); and PARA 7 text and note 4 ante.

4 As to execution by corporations see PARAS 40-41 post. Certificates of shares and share warrants issued under the Companies Act 1985 ss 186, 188 (both as substituted and amended), under seal, are not deeds: see *R v Morton* (1873) LR 2 CCR 22 at 27; para 1 ante; and COMPANIES vol 14 (2009) PARA 381.

5 Similar provision was made for these companies by the Companies Acts: see the Companies Act 1985 s 36 (as substituted); and COMPANIES vol 14 (2009) PARA 282 et seq.

6 See CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1122, 1261, 1272, 1274.

7 *Irons v Smallpiece* (1819) 2 B & Ald 551 at 552, 554; *Cochrane v Moore* (1890) 25 QBD 57 at 61, 67, 73, 75, CA. As to avoidance of assignment if unregistered and not followed by delivery of goods assigned within seven days see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1850. See also *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471 at 481, 483, CA; *Antoniadi v Smith* [1901] 2 KB 589, CA; *Casson v Churchley*

(1884) 53 LJQB 335 at 338. As to goods in possession of the bailee see PARA 12 note 1 ante. As regards the need for a deed where the transaction is contractual but gratuitous see PARA 59 post.

8 *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104 at 111, 113, CA (in which case it was, however, decided that an equitable assignment of a patent may well be made without deed, and that such an assignment may be registered as affecting the proprietorship of the patent). Registration of assignments is governed by the Patents Act 1977 ss 30, 32 (as substituted and amended): see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 374 et seq, 585 et seq.



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## **(ii) By Statute**

### **14. Under the Law of Property Act 1925.**

Under the Law of Property Act 1925, a deed is required in the following cases: (1) conveyances<sup>1</sup> of land<sup>2</sup> or of any interest in land, with certain exceptions<sup>3</sup>, for the purpose of conveying or creating a legal estate<sup>4</sup>; (2) mortgages of any property in order to incorporate therein the powers of sale, of insurance, of appointing a receiver, and of cutting timber conferred by the Act<sup>5</sup>; (3) conveyances by mortgagees exercising the power of sale conferred by the Act<sup>6</sup>; (4) mortgages in the statutory form authorised by the Act of freehold or leasehold land<sup>7</sup>; (5) a release of or a contract not to exercise any power (whether coupled with an interest or not) in exercise of the power to do so conferred by the Act<sup>8</sup>; (6) a disclaimer of a power in exercise of the power to disclaim so conferred<sup>9</sup>; and (7) enlargements under the Act of long terms of years<sup>10</sup>.

1 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; and 'convey' has a corresponding meaning: Law of Property Act 1925 s 205(1)(ii); but see PARA 15 post.

2 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent or other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land: *ibid* s 205(1)(ix) (definition amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 As to the exceptions see PARA 15 post.

4 Law of Property Act 1925 s 52(1). As to the estates, interests and charges in or over land (including certain rights of entry) which can subsist at law and which are, in the Law of Property Act 1925, referred to as 'legal estates' see ss 1(1), (2), (4), 205(1)(x) (ss 1(2), 205(1)(x) as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 45, 47. As to rights of entry see also ss 4(2), (3), 141; and REAL PROPERTY vol 39(2) (Reissue) PARAS 45, 231. See further REAL PROPERTY vol 39(2) (Reissue) PARA 232 et seq.

5 See *ibid* s 101(1); and MORTGAGE vol 77 (2010) PARA 437.

6 See *ibid* s 104(1); and MORTGAGE vol 77 (2010) PARA 444.

7 See *ibid* s 117(1); and MORTGAGE vol 77 (2010) PARAS 192, 223.

8 See *ibid* s 155; and POWERS vol 36(2) (Reissue) PARA 376.

9 See *ibid* s 156; and POWERS vol 36(2) (Reissue) PARA 375.

10 See *ibid* s 153 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 108 et seq.

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## 15. Conveyances for which a deed is not required.

The following conveyances are exceptions to the rule<sup>1</sup> that a conveyance of land or an interest in land must be by deed in order to convey or create a legal estate: (1) assents by a personal representative<sup>2</sup>; (2) disclaimers of onerous property by a trustee in bankruptcy or liquidator<sup>3</sup>, and disclaimers not required to be in writing<sup>4</sup>; (3) surrenders by operation of law, including surrenders which, by law, may be effected without writing<sup>5</sup>; (4) leases or tenancies or other assurances not required by law to be made in writing<sup>6</sup>; (5) receipts other than those falling within the provision of the Law of Property Act 1925 relating to reconveyances of mortgages by indorsed receipts<sup>7</sup>; (6) vesting orders of the court or other competent authority<sup>8</sup>; (7) conveyances taking effect by operation of law<sup>9</sup>. In these cases, therefore, a deed is not required<sup>10</sup>.

1 See PARA 14 ante.

2 Law of Property Act 1925 s 52(2)(a). An assent is the usual mode of conveying land by a personal representative to the devisee or other person entitled. This exception preserves the rule that an assent may be made by writing under hand only: see the Administration of Estates Act 1925 s 36(4); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 564.

3 Under the Insolvency Act 1986 s 315 (as amended), a trustee in bankruptcy may disclaim any onerous property: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq. A similar power is given to the liquidator of a company by the Insolvency Act 1986 s 178: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq.

4 See the Law of Property Act 1925 s 52(2)(b) (amended by the Insolvency Act 1986 s 439(2), Sch 14). No disclaimers, other than those referred to in note 3 supra, have to be in writing: see *Re Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632, [1968] 1 WLR 1125 at 1143, CA, per Danckwerts LJ. A trustee or executor may disclaim the trust or executorship by conduct and with it the legal estate in land subject to it: *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436 at 439, CA; *Re Clout and Frewer's Contract* [1924] 2 Ch 230. As to disclaimers by deed see PARA 14 ante.

5 Law of Property Act 1925 s 52(2)(c); and cf the Real Property Act 1845 s 3 (repealed). The Statute of Frauds (1677) s 3 (repealed: now replaced by the Law of Property Act 1925 s 53(1)(a)) required all surrenders of leases or freehold estates to be put in writing, except those made by operation of law. It has been held, however, that if, under an agreement made between a tenant of land for life or years and the immediate reversioner or remainderman in fee, the tenant gives up to the other and the other takes possession of the land, that is equivalent to a surrender by operation of law and the transaction may be valid without deed or writing: see eg *Thomas v Cook* (1818) 2 B & Ald 119; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 637.

6 Law of Property Act 1925 s 52(2)(d); and cf the Real Property Act 1845 s 3 (repealed), under which leases required to be in writing had to be under seal. Leases not required to be in writing are those which take effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can reasonably be obtained without taking a fine: Law of Property Act 1925 s 54(2). A lease to commence at a future date is not a lease 'taking effect in possession' within s 54(2) and is void for the purpose of conveying and creating a legal estate unless made by deed: see *Long v Tower Hamlets London Borough Council* [1998] Ch 197, [1996] 2 All ER 683. As to leases exceeding three years see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 102.

7 Law of Property Act 1925 s 52(2)(e) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 para 2). The text refers to the Law of Property Act 1925 s 115 (as amended) (see MORTGAGE vol 77 (2010) PARA 645 et seq): see s 52(2)(e) (as so amended). Section 52(2)(e) (as amended) does not apply to instruments delivered as deeds before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 came into force): see s 1(11); and PARA 7 text and note 4 ante. As to the application of this provision before 31 July 1990 see the Law of Property Act 1925 s 52(2)(e) (as originally enacted). As to the

application of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8) see s 1(9); and PARA 7 text and note 4 ante. These receipts are excepted because reconveyances of mortgages may be effected by indorsed receipts: see the Law of Property Act 1925 s 115 (as amended); and MORTGAGE vol 77 (2010) PARA 645 et seq.

8 Ibid s 52(2)(f). A vesting order may operate as a conveyance: see s 9(1)(a); and REAL PROPERTY vol 39(2) (Reissue) PARA 246.

9 Ibid s 52(2)(g). An example is the vesting of a bankrupt's estate in the trustee: see the Insolvency Act 1986 s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 391.

10 See the Law of Property Act 1925 s 52(2).

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## **16. Dispositions of registered land.**

Instruments intended to be registered under the Land Registration Act 2002 (for example, instruments intended to effect a transfer, charge, or exchange of registered land, or the transfer of any registered charge thereon, or to effect any alteration of a registered charge) are, by the combined operation of that Act and the rules and forms issued under that Act, required to be executed as deeds<sup>1</sup>.

<sup>1</sup> See the Land Registration Act 2002 s 27; the Land Registration Rules 2003, SI 2003/1417 (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 911 et seq. A transfer so executed is a deed: see PARA 1 ante. As to attestation of such instruments see PARA 44 post. As to electronic dispositions and electronic conveyancing generally see PARA 9 ante; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1049 et seq.

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## **17. Leases under the Settled Land Act 1925.**

Leases authorised by the Settled Land Act 1925 to be made by tenants for life and others of any settled land are required to be made by deed<sup>1</sup>; but leases at the best rent that can be reasonably obtained without fine, and without exempting the lessee from punishment for waste, may be made by any writing under hand where the term does not extend beyond three years from the date of the writing<sup>2</sup>. As from 1 January 1997<sup>3</sup> it is no longer possible to create any new settlements under the Settled Land Act 1925; but any existing settlements continue in being<sup>4</sup>, and accordingly leases may be granted under them as previously<sup>5</sup>.

1 See the Settled Land Act 1925 s 42; and SETTLEMENTS vol 42 (Reissue) PARAS 839-840. As to other leasing powers see ss 41, 43-48 (s 44 as amended); and SETTLEMENTS vol 42 (Reissue) PARA 837 et seq.

2 See ibid s 42(5)(ii); and SETTLEMENTS vol 42 (Reissue) PARA 839.

3 The date on which the Trusts of Land and Appointment of Trustees Act 1996 came into force: see s 27(2).

4 See ibid s 2; and SETTLEMENTS vol 42 (Reissue) PARA 676. As to the limited exceptions see s 2(2), (3); and SETTLEMENTS vol 42 (Reissue) PARA 676. As to the duration of settlements see the Settled Land Act 1925 s 3 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 708.

5 There is nothing in the Trusts of Land and Appointment of Trustees Act 1996 to affect the powers of leasing by tenants for life and others under the Settled Land Act 1925 ss 41-43.

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### **18. Appointment of new trustee.**

An appointment of a new trustee under the Trustee Act 1925, must be made in writing<sup>1</sup> and must be made by deed in every case in which it is intended to transfer any of the trust property by a vesting declaration under that Act, or in which, in the absence of such a declaration, it is intended that the appointment is to operate as if it contained one<sup>2</sup>. A declaration by a trustee of his desire to be discharged under that Act must be made by deed<sup>3</sup>.

A memorandum evidencing the appointment or discharge of a trustee of charity property by a resolution must be executed as a deed if it is to operate under the Charities Act 1993 as if it contained a vesting declaration<sup>4</sup>.

1 See the Trustee Act 1925 s 36(1), (6) (as amended); and TRUSTS vol 48 (2007 Reissue) PARAS 835-837.

2 See *ibid* s 40 (as amended); and TRUSTS vol 48 (2007 Reissue) PARAS 866-867.

3 See *ibid* s 39(1) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 891. The declaration is only effectual if, after the discharge, there will be either a trust corporation or at least two individuals to act as trustees: see s 39(1) (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 891.

4 See the Charities Act 1993 s 83(1)-(4); and CHARITIES vol 8 (2010) PARAS 280-281.

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## **19. Disentailing assurances.**

Dispositions made by way of disentailing assurance under the Fines and Recoveries Act 1833 by a tenant in tail are required to be made or evidenced by deed<sup>1</sup>. The consent of the protector of a settlement to the disposition by way of disentailing assurance under that Act of any hereditaments, or of any money subject to be invested in the purchase of lands of any tenure to be entailed, is required to be given either by the deed by which the disposition is effected or by a distinct deed<sup>2</sup>.

Dispositions by way of disentailing assurance under the Fines and Recoveries Act 1833<sup>3</sup> of any lands, tenements, or hereditaments, corporeal or incorporeal, to which any bankrupt is beneficially entitled at law or in equity for an estate tail or a base fee, are required to be made by deed<sup>4</sup>.

All the above requirements (and all other statutory provisions relating to estates tail in real property) apply to entailed personal property<sup>5</sup>.

As from 1 January 1997 it is no longer possible to create an entailed interest<sup>6</sup>, and it is no longer possible to create any new settlements under the Settled Land Act 1925, but any existing settlements under that Act continue in being<sup>7</sup>.

1 See the Fines and Recoveries Act 1833 s 40 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 125.

2 See *ibid* s 42 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 128.

3 The trustee in bankruptcy has the power to exercise in relation to any property comprised in the bankrupt's estate any powers the capacity to exercise which is vested in him under the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY); Insolvency Act 1986 s 314, Sch 5 para 12.

4 See the Fines and Recoveries Act 1833 s 56 (amended by the Statute Law Revision (No 2) Act 1888).

5 See the Law of Property Act 1925 s 130(1) (repealed except in relation to any entailed interest created before 1 January 1997); and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS vol 42 (Reissue) PARAS 678, 939.

6 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; and SETTLEMENTS vol 42 (Reissue) PARA 677. As to savings in relation to entailed interests created before 1 January 1997 (ie before the commencement of the Trusts of Land and Appointment of Trustees Act 1996), and savings consequential upon the abolition of the doctrine of conversion, see s 25(4), (5).

7 See *ibid* s 2; and SETTLEMENTS vol 42 (Reissue) PARA 676. As to the limited exceptions see s 2(2), (3); and SETTLEMENTS vol 42 (Reissue) PARA 676.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(ii) By Statute/20. Conveyances of church property etc.

## **20. Conveyances of church property etc.**

Leases made by ecclesiastical corporations under the powers given by the Ecclesiastical Leasing Act 1842 are required to be made by deed<sup>1</sup>.

The relinquishment of holy orders under the Clerical Disabilities Act 1870 can only be effected by deed<sup>2</sup>.

1 See the Ecclesiastical Leasing Act 1842 s 1 (as amended); and ECCLESIASTICAL LAW vol 14 para 1155. This provision is repealed in so far as it applies to any body corporate in any cathedral church by the Cathedrals Measure 1963 s 53, Sch 1, and so far as applying to incumbents by the Endowments and Glebe Measure 1976 s 47(3), Sch 7.

2 See the Clerical Disabilities Act 1870 s 3, by which enrolment and other formalities are required. As to the execution and attestation of such deeds see PARA 45 post. See further ECCLESIASTICAL LAW vol 14 paras 686, 688.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(ii) By Statute/21. Transfers of shares under the Companies Clauses Consolidation Act 1845.

## **21. Transfers of shares under the Companies Clauses Consolidation Act 1845.**

Transfers of shares in companies which are subject to the relevant provisions of the Companies Clauses Consolidation Act 1845 must, if carried out under those provisions, be effected by deed<sup>1</sup>. Alternative provisions contained in the Stock Transfer Act 1963 now, however, apply to transfers of fully-paid registered shares in all such companies, and permit transfer by a statutory or other form of transfer which is executed under hand and is not a deed<sup>2</sup>.

1 See the Companies Clauses Consolidation Act 1845 s 14; *Powell v London and Provincial Bank* [1893] 2 Ch 555, CA; and COMPANIES vol 15 (2009) PARA 1716. Shares in companies registered under the Companies Act 1985 are transferable in manner provided by the articles of association of the company or, if they are fully-paid registered shares and the company is limited by shares, alternatively in the manner provided by the Stock Transfer Act 1963 (which enables securities of certain descriptions to be transferred by a simplified process), or by regulations made under the Companies Act 1989 s 207 (as amended) (which enable title to securities to be evidenced and transferred without a written instrument): see the Companies Act 1985 s 182(1)(b) (as amended); and COMPANIES vol 15 (2009) PARA 1055. Articles of association may, but do not necessarily, require transfer by deed: see *Re Tahiti Cotton Co, ex p Sargent* (1874) LR 17 Eq 273 at 280; *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 22, HL; *Ireland v Hart* [1902] 1 Ch 522 at 524, 527-528.

2 See the Stock Transfer Act 1963 s 1 (as amended); and COMPANIES vol 14 (2009) PARA 400.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(ii) By Statute/22. Bills of sale.

## **22. Bills of sale.**

Bills of sale of personal chattels made or given by way of security for the payment of money by the grantor are void unless made by deed in statutory form<sup>1</sup>.

Any transfer of a registered ship<sup>2</sup>, or a share in such a ship, must be effected by a bill of sale satisfying the prescribed requirements<sup>3</sup>, unless the transfer will result in the ship ceasing to have a British connection<sup>4</sup>. A mortgage of a registered ship, or a share in a registered ship, must be made in the form prescribed by or approved under registration regulations<sup>5</sup>, and likewise a transfer of a registered mortgage<sup>6</sup>.

1 Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule. See further FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1682, 1711.

2 As to the meaning of 'ship' see the Merchant Shipping Act 1995 s 313(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 229.

3 As to registration regulations see *ibid* s 10; the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138 (as amended); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 253 et seq. For the meaning of 'prescribed' for these purposes see the Merchant Shipping Act 1995 Sch 1 para 14; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 306.

4 See *ibid* Sch 1 para 2(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 306-307.

5 See *ibid* Sch 1 para 7; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 318.

6 See *ibid* Sch 1 para 11; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 323.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(iii) In Equity/23. General rule.

### **(iii) In Equity**

#### **23. General rule.**

Whenever any question is raised (whether for the purpose of asserting some equitable right or otherwise) in any court possessing equitable jurisdiction as to the effect of any assurance, or alleged assurance, of some legal estate or interest in any real or personal property or other legal right, the invariable rule is that the validity of the assurance, as regards its operation to convey any such legal estate, interest, or right, must be tested by the rules of common law or statute required to be observed in order that it may take effect at law. In other words, equity follows the law with respect to the formalities necessary for the conveyance of any legal estate, interest or right<sup>1</sup>.

Thus (unless a declaration of trust is made) equity will not interfere to enforce or uphold a voluntary gift, which is incomplete for want of compliance with the formalities required at law, of any legal estate, interest or right<sup>2</sup>; and a voluntary gift made without deed, and without any declaration of trust, of any legal estate of freehold in possession in any land<sup>3</sup>, or of any legal term of years in any land<sup>4</sup>, is altogether void in equity as well as at law. A voluntary release of a debt owing at law is void, if not made by deed, both at law and in equity<sup>5</sup>.

1 See cases cited in notes 2-5 infra; Story's Equity Jurisprudence (3rd English Edn) 34 s 64. As to the relationship of equity to common law see EQUITY vol 16(2) (Reissue) PARA 401 et seq.

2 See eg *Colman v Sarrel* (1789) 1 Ves 50 at 52, 55 per Lord Eldon LC; *Ellison v Ellison* (1802) 6 Ves 656 at 662; *Antrobus v Smith* (1805) 12 Ves 39.

3 *Warriner v Rogers* (1873) LR 16 Eq 340. See PARA 14 ante.

4 *Richards v Delbridge* (1874) LR 18 Eq 11; and see PARA 14 ante.

5 *Edwards v Walters* [1896] 2 Ch 157 at 168, 172, CA; and see PARA 12 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(iii) In Equity/24. Trusts and equitable interests.

## 24. Trusts and equitable interests.

A deed is not required by the rules of equity either for the creation of any trust or for the assurance of any equitable estate or interest in any real or personal property held on trust or subject to any equity giving rise to an equitable estate or interest<sup>1</sup>. Thus trusts of personal estate (other than chattels real) may be created by word of mouth<sup>2</sup>. It is, however, provided by statute that no interest in land can be created or disposed of except by writing, signed by the person creating or conveying the interest or by his agent lawfully authorised in writing, or by will or by operation of law<sup>3</sup>, and that a declaration of trust respecting land or any interest in it must be manifested and proved by some writing signed by a person who is able to declare the trust<sup>4</sup> or by his will<sup>5</sup>. It is also provided by statute that a disposition of an equitable interest or trust, subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent lawfully authorised in writing, or by his will<sup>6</sup>. On the other hand it is not in general required that either a declaration of trust of land, or a disposition of an equitable interest or trust, should be made by deed<sup>7</sup>.

1 See Perkins, Profitable Book s 62; 1 Plowd 350; Doctor and Student, Dialogue, 2, cc 22, 23; Bacon's Law Tracts 306-307, 355; Shep Touch 517-521; 1 Fonblanque's Treatise of Equity (5th Edn) 176; 2 Fonblanque's Treatise of Equity (5th Edn) 21; 1 Sanders on Uses (5th Edn) 343-344; Lewin on Trusts (16th Edn) 22 et seq; 2 Davidson's Precedents in Conveyancing (4th Edn) Pt I, 449n; and consider the cases cited in notes 2, 7 infra; and PARA 25 notes 1-2 post.

2 *Nab v Nab* (1718) 10 Mod Rep 404 at 405 per Parker LC; *Fordyce v Willis* (1791) 3 Bro CC 577n at 587 per Lord Thurlow LC; *Bayley v Boulcott* (1828) 4 Russ 345 at 347 per Leach MR; *Benbow v Townsend* (1833) 1 My & K 506; *M'Fadden v Jenkyns* (1842) 1 Hare 458 at 461 per Wigram V-C (on appeal 1 Ph 153 at 157 per Lord Lyndhurst LC); *Vandenberg v Palmer* (1858) 4 K & J 204; *Jones v Lock* (1865) 1 Ch App 25 at 28 per Lord Cranworth LC. See also TRUSTS vol 48 (2007 Reissue) PARA 647.

3 Law of Property Act 1925 s 53(1)(a) (replacing the Statute of Frauds (1677) s 3 (repealed)).

4 See *Dye v Dye* (1884) 13 QBD 147, CA (pre-marital agreement before 1883, signed by husband only, renouncing claim to wife's property; ineffective to create trust for her separate use, as not signed by her).

5 Law of Property Act 1925 s 53(1)(b). This reproduces the Statute of Frauds (1677) s 7 (repealed), and like that provision it is confined to land, including chattels real: see *Smith v Matthews* (1861) 3 De GF & J 139; *Re Cozens*, *Green v Brisley* [1913] 2 Ch 478 (insufficient evidence of trust). Thus it does not alter the rule that trusts of personal estate, other than chattels real, can be created orally (see the text and notes 1-2 supra).

6 Law of Property Act 1925 s 53(1)(c) (replacing the Statute of Frauds (1677) s 9). The Law of Property Act 1925 s 53(1)(c) does not apply (if it would otherwise do so) in relation to a financial collateral arrangement: see the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 4(2). It is well established that the Law of Property Act 1925 s 53(1)(c) applies only to subsisting equitable interests: *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] 06 EG 140 (CS).

The Law of Property Act 1925 s 53(1)(c) is not confined to trusts respecting land, but applies also to trusts of personal property (see *Jerdein v Bright* (1861) 2 John & H 325 at 330-331), and expressly extends the requirement of writing to equitable interests generally, as well as to trusts, so that an assignment of an equity of redemption (where not clothed with the legal estate) clearly requires to be made in writing, whether it is for value or not, and since in the case of a legal mortgage the mortgagor now retains a legal estate, the assignment must be made by deed (see PARA 14 ante). In practice no one would be advised to make a voluntary assurance of any equity of redemption, even where it was not clothed with a legal estate, otherwise than by deed (see PARA 25 note 5 post). A direction to trustees to hold upon new trusts is a 'disposition' within the statutory provision: *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL; cf *Oughtred v IRC* [1960] AC 206, [1959] 3 All ER 623, HL (effect of oral agreement to exchange reversionary interest in settled shares for shares owned by life tenant); *Neville v Wilson* [1997] Ch 144, [1996] 3 All ER 171, CA. The provision does not apply where there is a disposition, not of the equitable interest alone, but of the entire estate: *Vandervell v IRC* [1967] 2 AC 291 at 311, 317, [1967] 1 All ER 1 at 7, 11, HL, per Lord Upjohn. Two or more documents, provided they are sufficiently

interconnected, will satisfy the requirement: *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248.

7 *Shortridge v Lamplough* (1702) 7 Mod Rep 71 at 76 per Holt CJ; and consider *Forster v Hale* (1798) 3 Ves 696 at 707 (affd (1800) 5 Ves 308); *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 205-207, CA. Dispositions of equitable interests under the Fines and Recoveries Act 1833 must be by deed: see PARA 19 ante.

## **UPDATE**

### **24 Trusts and equitable interests**

NOTE 6--As to the transfer of units in a unit trust scheme by electronic communication, see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 526.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(iii) In Equity/25. Voluntary assurances of equitable interest.

## 25. Voluntary assurances of equitable interest.

There is no doubt that a deed is not necessary to the validity of an assurance of an equitable interest if made for valuable consideration<sup>1</sup> and it is thought that, upon principle and according to the preponderance of authority, a deed is not necessary to effect the gratuitous assurance of any purely equitable estate, interest, or right, in any real or personal property, provided that the intention of actual and immediate assignment (as distinguished from a mere promise of future assignment or gift) is clearly expressed and that the assurance is put in writing and signed by the assesor<sup>2</sup>. It seems to follow that an express release made gratuitously of any purely equitable estate, interest, or right, in any lands or goods, such as the release of an equitable charge thereon, can also be made without a deed<sup>3</sup>. The conclusive and irrevocable effect of a deed as regards any gratuitous assurance contained in the deed<sup>4</sup>, is, however, recognised in equity as well as at law; and any gratuitous assignment made by deed of any purely equitable estate, interest, or right, is effective<sup>5</sup>.

1 See the authorities cited in para 24 note 1 ante; and *Re Leathes, ex p Leathes* (1833) 3 Deac & Ch 112; *Re Ogbourne, ex p Heathcoate* (1842) 2 Mont D & De G 711; *Dighton v Withers* (1862) 31 Beav 423 at 424; *Neve v Pennell* (1863) 2 Hem & M 170 at 186; *Tebb v Hodge* (1869) LR 5 CP 73, Ex Ch; *Credland v Potter* (1874) 10 Ch App 8 at 12, 14. It is a general rule of equity that an agreement made for valuable consideration to assign any equitable estate or interest in any property may operate as an equitable assignment thereof: see *Row v Dawson* (1749) 1 Ves Sen 331; *Wright v Wright* (1750) 1 Ves Sen 409; *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454 at 461-462, HL, per Lord Macnaghten.

2 It has been established that a direct assignment may well be made, without valuable consideration, of an equitable chose or thing in action: see *Kekewich v Manning* (1851) 1 De GM & G 176; *Voyle v Hughes* (1854) 2 Sm & G 18; *Donaldson v Donaldson* (1854) Kay 711; *Gilbert v Overton* (1864) 2 Hem & M 110; *Re Way's Trusts* (1864) 2 De GJ & Sm 365; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82, CA, in all of which cases, though the assignment was made by deed, the point decided was that an actual assignment of, as distinguished from a mere promise to assign, an equitable interest is valid, though made gratuitously. See further CHOSSES IN ACTION vol 13 (2009) PARAS 33-39. It has been further held that a gratuitous assignment of an equitable chose or thing in action may be made by a signed writing without deed: *Lambe v Orton* (1860) 1 Drew & Sm 125; *Re King, Sewell v King* (1879) 14 ChD 179; *Harding v Harding* (1886) 17 QBD 442; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; and see CHOSSES IN ACTION vol 13 (2009) PARAS 28, 37.

3 See *Re Hall, Holland v A-G* [1941] 2 All ER 358; affd on another point [1942] Ch 140, [1942] 1 All ER 10, CA. In that case although Morton J, at 370, came with some hesitation to the decision that the writing in question amounted to a release, he appeared not to doubt that such a writing could amount to a release. In *Re Hancock, Hancock v Berrey* (1888) 57 LJ Ch 793, where a debt secured by a mortgage of an equitable reversionary chose (or thing) in action had become barred by the Statute of Limitations and the mortgagee then sent the mortgage deed to the mortgagor with a letter expressing the intention of giving him the deed, it was held that the mere gift of the mortgage deed did not have the effect of releasing the charge, following *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA (see PARA 148 post), and declining to follow *Richards v Syms* (1740) Barn Ch 90, which had previously been treated as authoritative, even in the House of Lords (see *Byrn v Godfrey* (1798) 4 Ves 6 at 10; *Duffield v Elwes* (1827) 1 Bli NS 497 at 536, 540, HL; *Cross v Sprigg* (1849) 6 Hare 552 at 556). See PARA 77 note 3 post. It is submitted that the observation in *Re Hancock, Hancock, v Berrey* supra at 795-796 per Kay J, that he had asked for authority that a gratuitous parol release of a debt could be enforced, but none had been given, is not inconsistent with the proposition in the text since the debt under consideration was a legal chose in action.

4 See PARA 59 post.

5 See the cases cited in note 2 supra; and see also *Petre v Espinasse* (1834) 2 My & K 496; *Bill v Cureton* (1835) 2 My & K 503; *M'Donnell v Hesilrige* (1852) 16 Beav 346; *Pearson v Amicable Assurance Office* (1859) 27 Beav 229. Hence it is the invariable practice of conveyancers, when instructed to draw any voluntary

settlement, assignment, release, or other assurance of any equitable estate, interest, or right, to embody the parties' intention in a deed.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(2) WHEN A DEED IS NECESSARY/(iii) In Equity/26. Effect in equity of contract specifically enforceable.

## **26. Effect in equity of contract specifically enforceable.**

The equitable rule is clear that, with respect to the consequences of any act stipulated in a binding agreement to be performed, what ought to be done is to be treated as actually accomplished<sup>1</sup>. By virtue of this rule, to which effect is given in all courts<sup>2</sup>, where a contract specifically enforceable is made for the acquisition of some estate or interest in real or personal property, for the assurance of which a deed is required either by common law or statute, any party to the contract who has duly performed his part of the agreement is entitled, as against all persons against whom the contract can be specifically enforced, to enjoy the like advantages as if the contract had been completed by the deed required<sup>3</sup>.

1 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 215; *Guidot v Guidot* (1745) 3 Atk 254 at 256; *Trafford v Boehm* (1746) 3 Atk 440 at 446; *Crabtree v Bramble* (1747) 3 Atk 680 at 687; *Earl of Buckinghamshire v Drury* (1762) 2 Eden 60 at 65, HL; *Stead v Newdigate* (1817) 2 Mer 521 at 530; *Lysaght v Edwards* (1876) 2 ChD 499; *Re Cary-Elwes' Contract* [1906] 2 Ch 143 at 149. See EQUITY vol 16(2) (Reissue) PARAS 561-562.

2 See the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 49 (concurrent administration of law and equity); CIVIL PROCEDURE vol 11 (2009) PARA 533; COURTS vol 10 (Reissue) PARA 930; EQUITY vol 16(2) (Reissue) PARA 496.

3 See eg *Walsh v Lonsdale* (1882) 21 ChD 9, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 76 et seq. It should be noted that, while equitable assignments made without deed by way of sale or mortgage of lands, tenements, or hereditaments, or of shares in companies transferable by deed, are governed by the general rules of equity affecting such dispositions, similar assignments of ships or shares in them are subject to special provisions of the Merchant Shipping Act 1894 s 57 (repealed: see now the Merchant Shipping Act 1995 s 16, Sch 1) (see *Black v Williams* [1895] 1 Ch 408; *Barclay & Co Ltd v Poole* [1907] 2 Ch 284; para 21 ante; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 306); and equitable assignments of tangible goods, either absolutely or by way of mortgage, are affected by the Bills of Sale Acts (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1624 et seq). As to the necessity of satisfying the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARAS 145, 156 post) see *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA.

## **UPDATE**

## **26 Effect in equity of contract specifically enforceable**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(i) Formalities of Execution at Common Law/27. Sealing.

### **(3) EXECUTION OF A DEED**

#### **(i) Formalities of Execution at Common Law**

##### **27. Sealing.**

In certain circumstances<sup>1</sup>, a deed must be sealed, that is it must have a seal fixed or impressed upon or attached to it, and the party professing to be bound by the deed must do some act expressly or impliedly acknowledging the seal to be his<sup>2</sup>. It is not, however, necessary that any particular kind of seal is used, provided that there is affixed or impressed to or on the deed something purporting to be a seal. Thus the seal may be of wax affixed on the deed or attached to it by a ribbon, or it may be a wafer, or it may be simply impressed on the deed<sup>3</sup>. Indeed it may suffice that there is merely a printed circle inscribed within the letters 'L S' if the document was intended to be delivered as a deed of the party executing it<sup>4</sup>.

The seal need not bear any indication that it is the particular seal of the person who affixes it. Thus it need not be stamped with his coat-of-arms, crest, or initials, or otherwise specially marked, and it became the practice to use wax or wafer seals with a plain impression. A deed may be sealed with another person's seal<sup>5</sup>. Where several persons are parties to a deed it is not necessary, though it is the usual practice, for there to be as many seals as there are persons; and they may all seal the deed with one and the same seal<sup>6</sup>.

The party sealing need not actually affix or impress the seal himself, so long as he delivers the deed in his own person<sup>7</sup>, and in such case he need not touch the seal if he expressly or impliedly acknowledges it to be his<sup>8</sup>. Thus it is sufficient if the seal is affixed by some other person in his presence with his consent, and he so assents to the delivery of the deed<sup>9</sup>; or if some other person in his presence and with his consent writes his name opposite a seal previously affixed in token of his acknowledgment that the seal is his<sup>10</sup>; or if, when the seal has been affixed by some other person in his absence on his behalf, he afterwards in person acknowledges the deed to be his<sup>11</sup>. The traditional formal manner of sealing a deed is for the party to place his finger or thumb on the seal (which is generally already attached) at the same time as he utters the words 'I deliver this as my act and deed', which are equivalent to delivery<sup>12</sup>, but even this is not essential; if a party signs a document bearing wax or wafer or other indication of a seal with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed<sup>13</sup>.

Where a person executes a deed by stating that it has been 'signed, sealed and delivered' but without in fact sealing it, and another person relies on the deed to his detriment, the person executing the deed is estopped from denying that it was sealed<sup>14</sup>.

1   le (1) instruments delivered as deeds before 31 July 1990 (see PARA 1 et seq ante); (2) deeds required or authorised to be made under the seal of the county palatine of Lancaster, the seal of the Duchy of Lancaster, or the seal of the Duchy of Cornwall (see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(9); and PARA 7 note 4 ante); and (3) the execution of deeds by a corporation sole or a body corporate (see s 1(10); and PARA 32 text to note 3 post).

As from 31 July 1990, any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished: see s 1(1)(b); and PARAS 7 ante, 32 post.

2   Co Litt 6a; Perkins, Profitable Book ss 129-130; Shep Touch 56-57; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1 at 11, 14, CA; *Re Balkis Consolidated Co Ltd* (1888) 58 LT 300; *Re Smith, Oswell v Shepherd* (1892) 67 LT 64, CA; and see *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59; the

text and note 12 *infra*; and PARAS 1 note 2 *ante*, 59 note 1 *post*. There is a presumption in the case of deeds 20 years old produced from proper custody that they have been duly signed, sealed, attested and delivered according to their purport: see the Evidence Act 1938 s 4; and CIVIL PROCEDURE vol 11 (2009) PARA 869.

3 Shep Touch 57; 3 Preston's Abstracts of Title (2nd Edn) 61-62; *R v St Paul, Covent Garden Inhabitants*(1845) 7 QB 232 at 238-239; Sugden, Treatise on Powers (8th Edn) 232; *Re Sandilands*(1871) LR 6 CP 411 at 413; *National Provincial Bank of England v Jackson*(1886) 33 ChD 1 at 11, 14, CA; *Re Smith, Oswell v Shepherd* (1892) 67 LT 64, CA.

4 See *First National Securities Ltd v Jones*[1978] Ch 109, [1978] 2 All ER 221, CA (explaining *Re Balkis Consolidated Co Ltd* (1888) 58 LT 300); applied in *Commercial Credit Services v Knowles* [1978] CLY 794. See however *TCB Ltd v Gray*[1986] Ch 621, [1986] 1 All ER 587 (affd on another point [1987] Ch 458n, [1988] 1 All ER 108, CA); and the text to note 14 *infra*. The letters 'L S' stand for locus sigilli, meaning the place of the seal.

5 Bract fo 38a; YB 11 Edw 4, 4, pl 7; YB 21 Edw 4, 81, pl 30; Perkins, Profitable Book ss 130-134; *Sutton's Hospital Case* (1612) 10 Co Rep 1a at 30b, Ex Ch; Shep Touch 57; Vin Abr, Fairs (H); *Ball v Dunsterville* (1791) 4 Term Rep 313; 3 Preston's Abstracts of Title (2nd Edn) 61-62; *National Provincial Bank of England v Jackson*(1886) 33 ChD 1, CA.

6 Perkins, Profitable Book s 134; Shep Touch 57; *Lord Lovelace's Case* (1632) W Jo 268; *Ball v Dunsterville* (1791) 4 Term Rep 313; *Cooch v Goodman*(1842) 2 QB 580 at 598.

7 Perkins, Profitable Book ss 130, 134; Shep Touch 57; 2 Bl Com (14th Edn) 307. As to delivery see PARA 31 *post*.

8 *Ball v Dunsterville* (1791) 4 Term Rep 313; *Tupper v Foulkes* (1861) 9 CBNS 797; *Keith v Pratt* (1862) 10 WR 296.

9 *Ball v Dunsterville* (1791) 4 Term Rep 313.

10 *R v Longnor Inhabitants* (1833) 4 B & Ad 647.

11 *Tupper v Foulkes* (1861) 9 CBNS 797. In these cases, where the party delivers the deed in person, authority to affix the seal, or to write his name as an acknowledgment that the seal is his, may well be given by parol: see eg *R v Longnor Inhabitants* (1833) 4 B & Ad 647; *Tupper v Foulkes* *supra*. But authority to execute (that is to sign, if necessary, seal and deliver) a deed on behalf of another must be given by deed: see PARAS 13 *ante*, 30 note 8 *post*.

12 Williams and Eastwood on Real Property 430. See PARA 31 *post*.

13 *Stromdale and Ball Ltd v Burden*[1952] Ch 223 at 230, [1952] 1 All ER 59 at 62 per Danckwerts J.

14 *TCB Ltd v Gray*[1986] Ch 621, [1986] 1 All ER 587; affd on another point [1987] Ch 458n, [1988] 1 All ER 108, CA.

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## 28. Effect of sealing instrument in blank.

A deed must be written before it is sealed<sup>1</sup>. If, therefore, a person seals and delivers a writing which is left blank in some material part (as with regard to the name of the grantor or the grantee or the description of the property to be conveyed), it is void for uncertainty and is not his deed and cannot be made his deed merely by filling up the blanks after his execution of it<sup>2</sup>, though it may become his deed if he afterwards re-executes it<sup>3</sup>. A deed, however, is not necessarily void for uncertainty by reason of its having been executed with some blank spaces left in it; its language may be sufficient without filling up the blanks to ascertain the intention of the party who has executed it to do or enter into some act or agreement valid or enforceable in law<sup>4</sup>, and if so, the writing is his deed as it stands<sup>5</sup>.

1 Perkins, Profitable Book s 118; Com Dig, Fait (A1); Shep Touch 54; and see note 2 infra.

2 *Markham v Gonaston* (1598) Cro Eliz 626 at 627; *Weeks v Maillardet* (1811) 14 East 568; *Powell v Duff* (1812) 3 Camp 181; *West v Steward* (1845) 14 M & W 47 at 48 per Parke B (where a schedule of creditors, parties to the deed, was omitted); *Hibblewhite v M'Morine* (1840) 6 M & W 200 at 215-216; *Enthoven v Hoyle* (1852) 13 CB 373, Ex Ch; *Taylor v Great Indian Peninsula Rly Co* (1859) 4 De G & J 559; *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch; *France v Clark* (1884) 26 ChD 257 at 263, CA; *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL; *Powell v London and Provincial Bank* [1893] 1 Ch 610 (affd [1893] 2 Ch 555, CA); *Re Queensland Land and Coal Co, Davis v Martin* [1894] 3 Ch 181 at 183 (the last eight cases relate to transfers of shares or debentures executed in blank: see COMPANIES vol 14 (2009) PARA 401; and see now the Stock Transfer Act 1963 s 1(2); and COMPANIES vol 14 (2009) PARA 400); *Burgis v Constantine* [1908] 2 KB 484 at 491-492, 497, 500-501, CA (printed form of mortgage by deed of a ship with blank spaces for the necessary particulars executed by intending mortgagor and handed to the mortgagee to fill up).

3 *Hudson v Revett* (1829) 5 Bing 368 at 371; *Hibblewhite v M'Morine* (1840) 6 M & W 200 per Williams J. See further PARA 54 post.

4 See PARA 57 post.

5 *Doe d Lewis v Bingham* (1821) 4 B & Ald 672; *Hall v Chandless* (1827) 4 Bing 123; *Hudson v Revett* (1829) 5 Bing 368; *Hibblewhite v M'Morine* (1840) 6 M & W 200 per Parke B; *Adsetts v Hives* (1863) 33 Beav 52. Where a deed with blanks left in it is so valid, filling in the blanks after its execution constitutes an alteration of the deed: see PARAS 82-83 post. As to the validity of an agreement under hand with an immaterial blank see *Storer v Manchester City Council* [1974] 3 All ER 824, [1974] 1 WLR 1403, CA.

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## **29. Effect of delivery before sealing.**

A deed must be sealed before or at the time of its delivery<sup>1</sup>, but if it is delivered without being sealed it may subsequently be sealed and redelivered, in which case the sealing and redelivery will be the only effective execution of the deed<sup>2</sup>.

<sup>1</sup> *Goddard's Case* (1584) 2 Co Rep 4b at 5a; Finch's Law (1678 Edn) Book II c 2, 108; Shep Touch 57; and see *Davidson v Cooper* (1843) 11 M & W 778 (affd (1844) 13 M & W 343 at 353, Ex Ch).

<sup>2</sup> *Tupper v Foulkes* (1861) 9 CBNS 797. See PARA 54 post.

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### 30. Signing essential.

Since 31 December 1925, when an individual executes a deed, he must either sign it or place his mark upon it; sealing alone is not enough<sup>1</sup>. Formerly it was not essential that a deed should be signed as well as sealed<sup>2</sup>, but it was the regular practice for a person executing a deed to sign his name near the place where his seal was affixed as an acknowledgment that the seal was his and as a guarantee of authenticity<sup>3</sup>.

A signature in pencil may be equally binding on the party making it as the signature, if written in another manner, would be<sup>4</sup>. A rubber stamp imprinting a facsimile of the party's signature or mark will probably suffice, provided that it is impressed by the person executing, but if there are exceptional circumstances which make it impossible for the executing party to use the stamp, for example physical disability which prevents him from doing so, it may be that the stamp could be impressed by some third person on his behalf<sup>5</sup>. A typed or printed name (not in facsimile of the party's signature) may be insufficient<sup>6</sup>.

It has never been decided whether the writing of the name of a party by another (not authorised by a power of attorney) in the presence and by the direction of the party satisfied the statutory requirement<sup>7</sup> that an individual executing a deed must sign it<sup>8</sup>.

1 See, in relation to deeds executed after 31 December 1925, the Law of Property Act 1925 s 73 (repealed). See also *Stromdale and Ball Ltd v Burden* [1952] Ch 223 at 230, [1952] 1 All ER 59 at 62 per Danckwerts J.

As to the requirement of signing in relation to instruments delivered as deeds after 31 July 1990 see PARA 33 post.

2 *Termes de la Ley*, sv *Fait*; *Shep Touch* 60; *Maby v Shepherd* (1622) Cro Jac 640; *Cromwell v Grunsden* (1698) 2 Salk 462 per Holt CJ; *R v Goddard* (1703) 3 Salk 171; 2 Bl Com (14th Edn) 306; *Elliot v Davis* (1800) 2 Bos & P 338; *Wright v Wakeford* (1811) 17 Ves 454 at 459; *Ex p Hodgkinson* (1815) 19 Ves 291 at 296 per Lord Eldon LC (a bond); *Taunton v Pepler* (1820) 6 Madd 166; 3 Preston's Abstracts of Title (2nd Edn) 61-62; Sugden, *Treatise on Powers* (8th Edn) 234-235; *Tupper v Foulkes* (1861) 9 CBNS 797.

3 *Termes de la Ley*, sv *Fait*; 3 Preston's Abstracts of Title (2nd Edn) 62; Sugden, *Treatise on Powers* (8th Edn) 235; Williams and Eastwood on Real Property 434. A deed made in exercise of a power, which by its terms required the deed exercising the power to be signed and sealed, had perhaps to be signed as well as sealed: see PARA 48 note 5 post.

4 *Lucas v James* (1849) 7 Hare 410 at 419. See, however, *Francis v Grover* (1845) 5 Hare 39; *Re Adams Goods* (1872) LR 2 P & D 367 (these two cases refer to pencil writing in a will).

5 See *Goodman v J Eban Ltd* [1954] 1 QB 550, [1954] 1 All ER 763, CA; *LCC v Agricultural Food Products Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA.

6 *Goodman v J Eban Ltd* [1954] 1 QB 550 at 559, [1954] 1 All ER 763 at 767, CA, per Lord Evershed MR; *McDonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA; cf *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

7 See the Law of Property Act 1925 s 73 (repealed); and the text and note 1 supra.

8 It is clear that sealing may be accomplished by another in the presence and by the direction of the executing party: *Ball v Dunsterville* (1791) 4 Term Rep 313; *R v Longnor Inhabitants* (1833) 4 B & Ad 647. See also PARA 27 ante; and AGENCY vol 1 (2008) PARA 15. In *LCC v Agricultural Food Products Ltd* [1955] 2 QB 218 at 223-225, [1955] 2 All ER 229 at 232-233, CA, it was held that in general a person's signature, where required to a document, could be written by someone else authorised by him to do so, but that a statute may require personal signature and so not allow of such a signature by an agent or proxy. As to cases where a statutory requirement of signature permits signature by an agent see PARA 157 note 4 post. The Law of Property Act 1925

s 73 (repealed), read with the Powers of Attorney Act 1971 s 7(1) (as originally enacted) in relation to instruments delivered as deeds before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 came into force), authorised signature to be effected by an attorney under a power of attorney, but might be argued to be so worded as to have required personal signature in other cases. In *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 563, CA, per Bowen LJ, and at 556 per Kay LJ, it was said that a power of attorney is required to enable someone else to do any part of the execution which makes a deed. The cases on sealing cited above can be reconciled with this principle by regarding them as cases where the directions given by the executing parties to the agent acting in their presence amounted to acknowledgements by them of the seal or seals in question as their own. If signing could validly be effected in a similar manner, the statutory requirement of signature would scarcely add any compulsory element of personal authentication to the formalities of execution of a deed beyond those inherent in sealing and delivery. Moreover, the special statutory provision allowing a power of attorney to be signed and sealed by direction and in the presence of the donor of the power (see the Powers of Attorney Act 1971 s 1(1) (as amended); para 47 post; and AGENCY vol 1 (2008) PARA 16) appears to have been enacted on the footing that personal signature would otherwise be required and that it remains necessary for any other deed.

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### 31. Delivery of deed.

In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound by it, as well as sealed<sup>1</sup>. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct<sup>2</sup>. The traditional form of delivering a deed by words was for the executing party to say, while putting his finger on the seal, 'I deliver this as my act and deed'<sup>3</sup>. It was not necessary, however, to follow this form of execution<sup>4</sup>, and it fell into disuse; nor is it necessary that the deed should actually be delivered over into the possession or custody either of the person intended to take the benefit of the deed, or to a third person to the use of the party taking the benefit of the deed<sup>5</sup>; though if the party to be bound so hands over the deed, that is sufficient delivery without any words<sup>6</sup>.

What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it<sup>7</sup>) must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained in it<sup>8</sup>. Thus where a deed has been executed by an attorney in excess of his power, a subsequent acknowledgment by the principal, whether oral or in writing, that the deed expresses his intentions amounts to a delivery or redelivery of the deed<sup>9</sup>.

If the sealing of a deed is proved, its delivery as a deed may be inferred, provided there is nothing to show that it was only delivered as an escrow<sup>10</sup>.

1 See PARA 1 ante; YB 9 Hen 6, 37, pl 12; 1 Plowd 308; *Goddard's Case* (1584) 2 Co Rep 4b; *Clayton's Case* (1585) 5 Co Rep 1a; *Chamberlain v Stanton* (1588) Cro Eliz 122; Co Litt 35b, 171b; *Willis v Jermin* (1590) Cro Eliz 167 per Gawdy J; Termes de la Ley, sv Fait; Shep Touch 50, 57; 2 Bl Com (14th Edn) 306; 3 Preston's Abstracts of Title (2nd Edn) 63; *Styles v Wardle* (1825) 4 B & C 908 at 911 per Bayley J; *Doe d Garnons v Knight* (1826) 5 B & C 671; *Hall v Bainbridge* (1848) 12 QB 699 at 710; *Tupper v Foulkes* (1861) 9 CBNS 797 at 803; *Xenos v Wickham* (1863) 14 CBNS 435 at 473, Ex Ch (revsd (1866) LR 2 HL 296 at 309, 312, 320, 323); *Mowatt v Castle Steel and Iron Works Co* (1886) 34 ChD 58, CA.

As to delivery in relation to instruments delivered as deeds after 31 July 1990 see PARA 34 post.

2 *Chamberlain v Stanton* (1588) Cro Eliz 122; *Thoroughgood's Case* (1612) 9 Co Rep 136b; Co Litt 36a, 49b; Shep Touch 57-58; *Hall v Bainbridge* (1848) 12 QB 699; *Tupper v Foulkes* (1861) 9 CBNS 797; *Xenos v Wickham* (1867) LR 2 HL 296.

3 3 Preston's Abstracts of Title (2nd Edn) 63; *Xenos v Wickham* (1866) LR 2 HL 296; Williams and Eastwood on Real Property 430; and see PARAS 1, 27 ante.

4 *Tupper v Foulkes* (1861) 9 CBNS 797; *Keith v Pratt* (1862) 10 WR 296.

5 *Doe d Garnons v Knight* (1826) 5 B & C 671 at 689-692; *Exton v Scott* (1833) 6 Sim 31; *Grugeon v Gerrard* (1840) 4 Y & C Ex 119 at 130; *Fletcher v Fletcher* (1844) 4 Hare 67 at 79; *Evans v Grey* (1882) 9 LR Ir 539; *Xenos v Wickham* (1866) LR 2 HL 296; *Macedo v Stroud* [1922] 2 AC 330, PC. See also *Alford v Lee* (1587) Cro Eliz 54 (concerning a bond). As to concealment of execution see PARA 65 post.

6 *Butler and Baker's Case* (1591) 3 Co Rep 25a at 26b, Ex Ch; *Thoroughgood's Case* (1612) 9 Co Rep 136b; *Doe d Garnons v Knight* (1826) 5 B & C 671; *Xenos v Wickham* (1866) LR 2 HL 296 at 312 per Blackburn J.

7 See PARA 27 ante.

8 See *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, [1969] 2 All ER 941, CA; and the cases cited in notes 2, 4-5 supra. See also *Taw v Bury* (1558) 2 Dyer 167a; *Parker v Tenant* (1560) 2 Dyer 192b; *Shelton's Case* (1582) Cro Eliz 7; *Hollingworth v Ascue* (1594) Cro Eliz 355 at 356; *R v Longnor Inhabitants* (1833) 4 B & Ad 647 at 649; *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608, CA.

Compare the cases relating to delivery as an escrow, cited in para 37 notes 6-7 post. Acknowledgment of a deed already sealed, but which is in another room, may be sufficient: *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 566, CA.

9 *Re Seymour, Fielding v Seymour* [1913] 1 Ch 475, CA.

10 *Hall v Bainbridge* (1848) 12 QB 699; *Keith v Pratt* (1862) 10 WR 296; *Xenos v Wickham* (1866) LR 2 HL 296. Consider also the cases cited in note 8 supra; and PARA 37 notes 6-7 post.

It appears that if several deeds conveying the same land to different persons were delivered to them simultaneously, that might formerly have operated to vest the land in them as tenants in common in equal shares: *Hopgood v Ernest* (1865) 3 De GJ & Sm 116 per Wood V-C. The decision in that case was reversed in the Court of Appeal on other grounds, assuming the vice-chancellor's decision on the above point to be correct, but without expressing any opinion on it. But now that tenancy in common at law is abolished (see the Law of Property Act 1925 s 1(6); and REAL PROPERTY vol 39(2) (Reissue) PARA 55), that result could not follow. An alternative might be for the grantees to take as joint tenants on trust for the persons interested in the land under s 34(2) (as amended) (see REAL PROPERTY vol 39(2) (Reissue) PARA 211), but it is doubtful if the case could be brought within the terms of that provision.



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## **(ii) Formalities of Execution under the Law of Property (Miscellaneous Provisions) Act 1989**

### **32. Sealing.**

Any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual<sup>1</sup> was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 in relation to instruments delivered as deeds on or after 31 July 1990<sup>2</sup>. The reference to the execution of a deed by an individual does not, however, include execution by a corporation sole<sup>3</sup> or a body corporate, to which the common law rule continues to apply<sup>4</sup>. Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before 31 July 1990, the provisions relating to deeds and their execution<sup>5</sup> have effect as to signing, sealing or delivery of an instrument by an individual<sup>6</sup> in place of any provision of that Act as to signing, sealing or delivery<sup>7</sup>.

1 See PARA 27 ante.

2 Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b). See PARA 7 ante. As to the application of s 1(1)(b) see s 1(9); and PARA 7 text and note 4 ante. As to the common law position in relation to instruments delivered as deeds before 31 July 1990 see PARA 27 ante.

3 Ibid s 1(10).

4 As to the execution of deeds by or on behalf of corporations see the Law of Property Act 1925 s 74 (as amended); and PARAS 40-42 post. As to execution by a corporation aggregate see also s 74A (as added); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1265 ante.

5 I.e. the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended) (see PARAS 7-8 ante): see s 1(7).

6 The reference to signing, sealing or delivery by an individual does not include signing, sealing or delivery by a corporation sole: *ibid* s 1(10).

7 Ibid s 1(7). As to the application of s 1(7) see s 1(9); and PARA 7 text and note 4 ante.

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### 33. Signing.

An instrument is validly executed as a deed by an individual<sup>1</sup> if, and only if<sup>2</sup>: (1) it is signed<sup>3</sup> by him in the presence of a witness who attests the signature<sup>4</sup>, or at his direction and in his presence and the presence of two witnesses who each attests the signature<sup>5</sup>; and (2) it is delivered as a deed<sup>6</sup>.

This provision does not apply in relation to instruments delivered as deeds before 31 July 1990<sup>7</sup>.

1 This does not include execution by a corporation sole: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(10); and PARA 32 text to note 3 ante. As to corporations sole see CORPORATIONS.

2 Ibid s 1(3). The requirement of signing contained in the Law of Property Act 1925 s 73(1) (repealed) has been replaced by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) (as amended). See also note 6 infra.

3 For the meaning of 'sign' see PARA 8 note 2 ante. It has been held, in relation to ibid s 2 (as amended) (see SALE OF LAND vol 42 (Reissue) PARAS 29-40), that a name printed or typed at the head of a document does not constitute a signature: *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA. It is thought that this is equally true in relation to the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended): see PARAS 7-8, 32 ante.

4 Ibid s 1(3)(a)(i). Cf *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, [2001] 3 All ER 138; and PARA 36 post. See note 6 infra.

5 Law of Property (Miscellaneous Provisions) Act 1989 s 1(3)(a)(ii). See note 6 infra.

6 Ibid s 1(3)(b) (amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 10(2), Sch 2).

The Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) (as amended) applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual: s 1(4A) (added by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 7(4)). As to the application of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) (as amended) see also s 1(9); and PARA 7 text and note 4 ante.

7 I.e. the date on which ibid s 1 came into force: see s 1(11); and PARA 7 text and note 4 ante.

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### **34. Delivery.**

Any rule of law which required authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed<sup>1</sup> was abolished by the Law of Property (Miscellaneous Provisions) Act 1989<sup>2</sup>.

Where a solicitor<sup>3</sup>, duly certificated notary public<sup>4</sup> or licensed conveyancer<sup>5</sup>, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction, purports to deliver an instrument as a deed on behalf of a party to the instrument, it is conclusively presumed in favour of a purchaser<sup>6</sup> that he is authorised so to deliver the instrument<sup>7</sup>.

This provision does not apply in relation to instruments delivered as deeds before 31 July 1990<sup>8</sup>.

1 See PARAS 29, 31 ante.

2 Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(c). See PARA 7 ante.

3 For the meaning of 'solicitor' see LEGAL PROFESSIONS vol 65 (2008) PARA 600.

4 For these purposes, 'duly certified notary public' has the same meaning as it has in the Solicitors Act 1974 s 87 (see LEGAL PROFESSIONS vol 66 (2009) PARA 1412); Law of Property (Miscellaneous Provisions) Act 1989 s 1(6) (definition amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, arts 9, 10(2), Sch 2).

5 For the meaning of 'licensed conveyancer' see the Administration of Justice Act 1985 s 11(2); and LEGAL PROFESSIONS vol 66 (2009) PARA 1319.

6 'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in the Law of Property Act 1925 Pt I (ss 1-40) (as amended) and elsewhere where so expressly provided 'purchaser' only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires 'purchaser' includes an intending purchaser; 'purchase' has a meaning corresponding with that of 'purchaser'; and 'valuable consideration' includes marriage, and formation of a civil partnership, but does not include a nominal consideration in money: s 205(1)(xxi) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 7); definition applied by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(6) (amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 10(1), Sch 1 paras 13, 15).

7 Law of Property (Miscellaneous Provisions) Act 1989 s 1(5) (amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, arts 9, 10(2), Sch 2).

8 Ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 ante.

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### **(iii) Reading over and Attestation**

#### **35. Reading over.**

Before a party executes a deed, it should be read by him, or correctly read over or fully and accurately explained to him, and he cannot be required to execute it until this has been done<sup>1</sup>. If he is content to execute it without so informing himself of its contents, it will in general be binding on him, even though its contents are materially different from what he supposed, and even though he is himself illiterate or blind<sup>2</sup>. However, if the party executing the deed acts with reasonable care and yet is mistaken or misled (in particular, if he is illiterate or blind and it is falsely read over or falsely explained to him), and in consequence there is a radical or fundamental distinction between what it is and what he believed it to be, not attributable to a mistake of law as to its effect, the plea of non est factum will be available and the deed will be void<sup>3</sup>. Even though all the requirements for avoiding the deed on this ground may not be fulfilled, a misled executing party may be able to treat the deed as voidable under the law relating to misrepresentation, or it may be void as executed under a mutual mistake of fact<sup>4</sup>.

1 *Thoroughgood's Case* (1584) 2 Co Rep 9a at 9b.

2 *Thoroughgood's Case* (1584) 2 Co Rep 9a at 9b; *Maunxel's Case* (1583) Moore KB 182 at 184. See PARAS 69-71 post.

3 *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL. See PARAS 69, 71 post.

4 See PARA 67 et seq post. As to misrepresentation generally see MISREPRESENTATION AND FRAUD. As to mistake generally see MISTAKE.

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### 36. Attestation.

Unless required by statute, it is not necessary to the validity of a deed that its execution be attested by any witness<sup>1</sup>. It is and has long been the practice to execute deeds in the presence of a witness or witnesses, and to indorse on or subscribe to the deed a statement that it has been so signed, sealed, and delivered, and for the attesting witness to sign his name to the statement and to add his address and description<sup>2</sup>. Attestation is now required for the valid execution of a deed by an individual in instruments delivered on or after 31 July 1990<sup>3</sup>. In other cases attestation by one or more witnesses is required by statute<sup>4</sup>; but, even where a statute requires attestation, an unattested instrument may be valid between the parties to it though ineffective against other persons<sup>5</sup>.

A witness must actually be present at and witness the execution of the deed; attestation upon the acknowledgment of the party is not sufficient<sup>6</sup>.

It appears that there is now no reason under the general law why husbands and wives should not witness one another's signature<sup>7</sup>.

1 *Goddard's Case* (1584) 2 Co Rep 4b at 5a; *Garrett v Lister* (1661) 1 Lev 25; *Keith v Pratt* (1862) 10 WR 296; 2 Bl Com (14th Edn) 307-308, 378; 3 Preston's Abstracts of Title (2nd Edn) 71; Williams and Eastwood on Real Property 476. As to the necessity for attestation in certain cases see PARA 44 et seq post.

2 Co Litt 6a; 2 Bl Com (14th Edn) 307-308; 3 Preston's Abstracts of Title (2nd Edn) 71; Sugden, Treatise on Powers (8th Edn) 234-235; Williams and Eastwood on Real Property 476. It is always advisable that the execution of deeds should be attested according to the usual practice in order to preserve evidence of their execution (3 Preston's Abstracts of Title (2nd Edn) 71; Williams and Eastwood on Real Property 476). An instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive: Evidence Act 1938 s 3; and see CIVIL PROCEDURE vol 11 (2009) PARA 866. The witness must be some person who is not a party to the deed; and a statement of its execution in his presence should be written on the deed and signed by him: *Coles v Trecothick* (1804) 9 Ves 234 at 251; *Freshfield v Reed* (1842) 9 M & W 404; *Wickham v Marquis of Bath* (1865) LR 1 Eq 17 at 24-25; *Seal v Claridge* (1881) 7 QBD 516 at 519, CA.

3 I.e. the date on which the Law of Property (Miscellaneous Provisions) Act 1989 came into force: see s 1(3), (11) (s 1(3) as amended); and PARAS 6, 7, 33 ante. This does not include execution by a corporation sole: see s 1(10); and PARA 32 text to note 3 ante. As to the application of s 1(3) (as amended) see s 1(9); and PARA 7 text and note 4 ante.

4 See PARA 44 et seq post.

5 *National and Grindlays Bank Ltd v Dharamshi Vallabhji* [1967] 1 AC 207, [1966] 2 All ER 626, PC.

6 *Shamu Patter v Abdul Kadir Ravathan* (1912) 28 TLR 583, PC. A signature on a transfer of shares cannot, however, be challenged because the witness did not see the deceased transferor sign or hear her acknowledge her signature if such omission was merely an irregularity which the company involved might waive: *Smellie's Trustees v Smellie* 1953 SLT (Notes) 22. Cf *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, [2001] 3 All ER 138 (deed valid although signed in absence of witness); and see also ESTOPPEL vol 16(2) (Reissue) PARAS 960, 1011.

7 See the letters in The Times dated 24 December 1952 and 5 January 1953 from Lord Asquith of Bishopstone and Professor AL Goodhart QC. Documents so witnessed are accepted for registration at HM Land Registry: see the letter in The Times dated 7 January 1953; and 97 Sol Jo 36.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(iv) Delivery as an Escrow/37. Escrow.

## **(iv) Delivery as an Escrow**

### **37. Escrow.**

An intended deed may, after due completion of the formalities required for execution as a deed<sup>1</sup>, be delivered as an escrow (or scroll), that is as a simple writing which is not to become the deed of the party expressed to be bound by it until some condition has been performed<sup>2</sup>. Thus a conveyance on sale or a mortgage or a surrender discharging a mortgage may be delivered in escrow so as to be binding on the grantor only if the grantee pays the consideration money or only if the grantee executes a counterpart<sup>3</sup> or some other deed or document as agreed with the grantor<sup>4</sup>.

Like delivery as a deed<sup>5</sup>, delivery as an escrow may be made in words or by conduct although it need not be made in any special form or accompanied with any particular words, the essential thing in the case of delivery as an escrow being that the party should expressly or impliedly declare his intention to be bound by the provisions inscribed, not immediately, but only in the case of and upon performance of some condition then<sup>6</sup> stated or ascertained<sup>7</sup>. In the absence of direct evidence whether or not a deed of conveyance was delivered as an escrow, the fact that only part of the purchase price has been paid at the time of delivery justifies the inference that the deed was delivered as an escrow pending payment of the balance<sup>8</sup>.

1 As to instruments delivered on or after 31 July 1990 see PARAS 7, 32-34 ante; and as to instruments delivered before that date see PARAS 27-31 ante.

2 YB 9 Hen 6, 37, pl 12; Keil (1507) 88 pl 2; Perkins, Profitable Book s 138; *Perryman's Case* (1599) 5 Co Rep 84a, b; Shep Touch 58-59; 2 Bl Com (14th Edn) 307; *Xenos v Wickham* (1866) LR 2 HL 296 at 323; *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42, [1989] 30 EG 92; and see the cases cited in note 7 infra. In the absence of express provision, the condition on which an escrow is delivered will depend on inference from the circumstances: *Kingston v Ambrian Investment Co Ltd* [1975] 1 All ER 120, [1975] 1 WLR 161, CA. The condition must not be such that the deed will only become operative on the death of the grantor; in that case it is a testamentary document and cannot take effect as an escrow: *Governors and Guardians of Foundling Hospital v Crane* [1911] 2 KB 367, CA. As to the time limit for the performance of the condition see *Glessing v Green* [1975] 2 All ER 696, [1975] 1 WLR 863, CA. See also *Terrapin International Ltd v IRC* [1976] 2 All ER 461, [1976] 1 WLR 665.

3 As to counterpart deeds see PARA 4 ante.

4 See cases cited in note 7 infra.

5 See PARAS 31, 34 ante.

6 See *Doe d Lloyd v Bennett* (1837) 8 C & P 124.

7 *Johnson v Baker* (1821) 4 B & Ald 440; *Murray v Earl of Stair* (1823) 2 B & C 82; *Bowker v Burdekin* (1843) 11 M & W 128 at 147; *Nash v Flynn* (1844) 1 Jo & Lat 162; *Gudgen v Besset* (1856) 6 E & B 986; *Phillips v Edwards* (1864) 33 Beav 440 at 445-447; *Walker v Ware etc Rly Co* (1865) 35 Beav 52 at 58; *Xenos v Wickham* (1866) LR 2 HL 296 at 311, 323; *Watkins v Nash* (1875) LR 20 Eq 262; *Coupe v Collyer* (1890) 62 LT 927; *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192 at 194; *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608 at 620-622, CA; *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Bentray Investments Ltd v Venner Time Switches Ltd* [1985] 1 EGLR 39, 274 Estates Gazette 43. As to the distinction between an agreement which merely suspends and an agreement which destroys the document see *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushness* [1914] 3 KB 907 at 909. See PARA 196 note 3 post. See also *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA.

8     *Thompson v McCullough* [1947] KB 447 at 453-454, [1947] 1 All ER 265 at 267-268, CA, per Morton LJ. See also *AIB Group (UK) plc v Hennelly Properties Ltd* [2000] EGCS 63, [2000] All ER (D) 685 (mortgage unlikely to be delivered as escrow).

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### 38. To whom escrow may be delivered.

For a deed to be executed as an escrow, it need not be actually delivered into the custody of a stranger<sup>1</sup> to the deed to keep until performance of the condition, and then to deliver it over to the party intended to benefit<sup>2</sup>. A deed may well be delivered as an escrow though the party to be bound retains it in his own possession<sup>3</sup>. It may be delivered as an escrow to an attorney acting for all parties thereto<sup>4</sup>, and even to the solicitor acting for the party to benefit under the deed, provided it is handed to him as the agent of all parties for the purpose of such delivery<sup>5</sup>.

Where several persons are parties to a deed as grantees and one of them is also the solicitor of the other grantees and of the grantor, and the deed is delivered to him, evidence is admissible to prove that it was delivered to him, not as a grantee, but in his capacity of solicitor to the grantor and as an escrow to take effect only upon the performance of some condition<sup>6</sup>.

However, a deed cannot be delivered as an escrow to the party intended to benefit under it, as such, because delivery of the document to him is necessarily its delivery as a deed<sup>7</sup>, and any stipulation then made by word of mouth and purporting to suspend the operation of the deed until the performance of some condition would be repugnant to such delivery, and the party delivering the deed would be estopped from averring such a stipulation in contradiction of the deed<sup>8</sup>. Previously in equity, if an instrument was delivered as a deed (or a fortiori as an escrow) to a party to benefit under it, upon an agreement that it should not take effect until the performance of some condition, he would be restrained from enforcing it at law until the condition was fulfilled, and if the condition was not observed, the other party would be relieved from liability under the deed<sup>9</sup>.

1    Ie a person who is not a party to the deed or the agent of some party to the deed.

2    In this respect the cases cited in notes 3-6 infra have modified the rule laid down in the earlier authorities cited in note 8 infra.

3    *Gudgen v Besset* (1856) 6 E & B 986; *Phillips v Edwards* (1864) 33 Beav 440; *Walker v Ware etc Rly Co* (1865) 35 Beav 52; *Xenos v Wickham* (1866) LR 2 HL 296.

4    *Millership v Brookes* (1860) 5 H & N 797. But if a deed is delivered to the agent of the grantor to hold until further instructions this does not constitute delivery as an escrow: *Governors and Guardians of Foundling Hospital v Crane* [1911] 2 KB 367, CA; and see *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 88, [1960] 2 All ER 568 (revsd on another point [1961] Ch 375, [1961] 1 All ER 277, CA); *Beesly v Hallwood Estates Ltd* [1961] Ch 105, [1961] 1 All ER 90, CA.

5    *Watkins v Nash* (1875) LR 20 Eq 262.

6    *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608, CA, in which case, however, the court found the fact to be that the deed had been delivered unconditionally.

7    See PARAS 31, 34 ante.

8    *Whyddon's Case* (1596) Cro Eliz 520; *Williams v Green* (1602) Cro Eliz 884; *Thoroughgood's Case* (1612) 9 Co Rep 136b at 137b; *Holford v Parker* (1618) Hob 246; *Bushell v Pasmore* (1704) 6 Mod Rep 217 at 218; *Coare v Giblett* (1803) 4 East 85 at 95 per Lord Ellenborough CJ; Co Litt 36a, n (3); Shep Touch 58-59; 3 Preston's Abstracts of Title (2nd Edn) 64; *Pym v Campbell* (1856) 6 E & B 370 at 374 per Crompton J; and see *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26a, b. It is considered that the dictum of Hall V-C in *Watkins v Nash* (1875) LR 20 Eq 262 at 266 (which was made with reference to the delivery of a deed by one grantor, not to the grantee, but to a co-grantor to keep as an escrow), and the decision in *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608, CA, do not go so far as to overrule the authorities here stated. There are,



however, some old cases to the contrary effect: see *Wilcock v Hewson* (1597) Moore KB 696; *Hawksland v Gatchel* (1601) Cro Eliz 835; *Anon* (1603) Noy 50.

9 *Sir George Maxwell's Case* (1720) 1 Eq Cas Abr 20 pl 5; *Walker v Walker* (1740) 2 Atk 98 at 99; *England v Codrington* (1758) 1 Eden 169; *Underhill v Horwood* (1804) 10 Ves 209 at 255; *Carew's Case (No 2)* (1855) 7 De GM & G 43 at 52; *Evans v Bremridge* (1855) 2 K & J 174 (on appeal (1856) 8 De GM & G 100); *Griffin v Clowes* (1855) 20 Beav 61 at 65-66; *Douglas v Culverwell* (1862) 4 De GF & J 20 at 26; *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557 at 564, CA; *Bond v Walford* (1886) 32 ChD 238. The statement by Sir George Jessel MR in *Luke v South Kensington Hotel Co* (1879) 11 ChD 121 at 125, CA, that 'it is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute', is expressed too widely: *Lady Naas v Westminster Bank Ltd* [1940] AC 366 at 374-377, [1940] 1 All ER 485 at 488-490, HL, per Viscount Maugham LC; and see further PARA 62 post. Since the Judicature Acts, this equity may be asserted in all courts: see now the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 49; and COURTS vol 10 (Reissue) PARA 639. It may not be asserted where the deed operates as a conveyance of property, against persons who have, since the delivery of the deed, acquired some legal or equitable estate or interest under it as purchasers for value without notice of the agreement suspending or modifying the operation of the deed: see *Phillips v Phillips* (1862) 4 De GF & J 208 at 218; *Hunter v Walters* (1871) 7 Ch App 75; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1 at 13, CA; *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192 at 197; and EQUITY. If the deed was a bond or a covenant, the assignees of the benefit thereof would take subject to all equities existing between the parties thereto: *Athenaeum Life Assurance Society v Pooley* (1858) 3 De G & J 294; *Graham v Johnson* (1869) LR 8 Eq 36 at 43; *Re Palmer's Decoration and Furnishing Co* [1904] 2 Ch 743; and see the Law of Property Act 1925 s 136(1). It is submitted that if a person were to deliver a deed, which purported on the face of it to be an immediate and absolute conveyance of property, to the grantee thereunder as an escrow upon an oral agreement that it should not take effect as a deed until the payment by the grantee of some purchase or mortgage money or the performance of some other condition, he would be estopped, not only by his deed, but also by his conduct in entrusting to the grantee the custody of such a title deed (being the sign of ownership), from averring the oral agreement under which the deed was to take effect as an escrow only: see *Rice v Rice* (1854) 2 Drew 73 at 83-85; *King v Smith* [1900] 2 Ch 425; *Rimmer v Webster* [1902] 2 Ch 163 at 173-174.

## UPDATE

### 38 To whom escrow may be delivered

NOTE 9--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

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### 39. Effect of delivery as escrow.

When an instrument<sup>1</sup> is delivered as an escrow it cannot take effect as a deed pending the performance of the condition subject to which it was so delivered, and if that condition is not performed the writing remains entirely inoperative<sup>2</sup>. If, therefore, an instrument delivered as an escrow comes, pending the performance of the condition and without the consent, fault, or negligence of the party who so delivered it, into the possession of the party intended to benefit, it has no effect either in his hands or in the hands of any purchaser from him; for until fulfilment of the condition it is not, and never has been, the deed of the party who so delivered it<sup>3</sup>. When an instrument has been delivered as an escrow to await the performance of some condition, it takes effect as a deed (without any further delivery) immediately the condition is fulfilled, and the rule is that its delivery as a deed will relate back to the time of its delivery as an escrow but only for such purposes as are necessary to give efficacy to the transaction<sup>4</sup>; thus the relation back does not have the effect of validating a notice to quit given at a time when the fee simple was not vested in the person giving it<sup>5</sup>. Where time is of the essence and the time for fulfilling the condition of the escrow has elapsed the doctrine of relation back cannot be applied<sup>6</sup>.

It follows that, for a deed delivered as an escrow to take effect, the party making it must be fully capable, at the time of its delivery as an escrow, of doing the act evidenced by the deed. Thus if a minor were to deliver a deed of mortgage as an escrow to take effect on his attaining full age, such delivery would be altogether void<sup>7</sup>. On the other hand, where the party to be bound by the deed has in all respects full capacity to do the act to be evidenced by it at the time of its delivery as an escrow, it will be no ground for avoiding the deed if he dies or ceases to be sui juris before the condition is performed<sup>8</sup>.

When a deed has been delivered to a third party as an escrow, possession of the deed by the grantee is prima facie evidence of the performance of the condition<sup>9</sup>.

1 In the case of an instrument delivered before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 ante), the instrument is a sealed writing: see PARAS 27, 32 ante. As to other cases where a seal is still required see PARA 32 ante.

2 *Gudgen v Besset* (1856) 6 E & B 986; *Phillips v Edwards* (1864) 33 Beav 440 at 446-447; *Walker v Ware etc Rly Co* (1865) 35 Beav 52 at 58; *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192; *Wm Cory & Son Ltd v IRC* [1964] 3 All ER 66 at 74, [1964] 1 WLR 1332 at 1346, CA, per Diplock LJ; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, [1969] 2 All ER 941, CA; *Terrapin International Ltd v IRC* [1976] 2 All ER 461, [1976] 1 WLR 665; *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 2 Lloyd's Rep 142, CA; and see the other cases cited in para 37 note 7 ante.

3 YB 9 Hen 6, 37, p 12; Perkins, Profitable Book ss 138, 142; Vin Abr, Faits (M), pl 1, 4; *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192. Ex hypothesi no case of estoppel by conduct has arisen: see PARA 38 notes 8-9 ante.

4 *Jennings v Bragg* (1595) Cro Eliz 447; *Butler and Baker's Case* (1591) 3 Co Rep 25a at 35b, 36a, Ex Ch; *Perryman's Case* (1599) 5 Co Rep 84a at 84b; Shep Touch 59-60; *Graham v Graham* (1791) 1 Ves 272 at 274-275 per Lord Ellenborough CJ; *Coare v Giblett* (1803) 4 East 85 at 94-95; *Copeland v Stephens* (1818) 1 B & Ald 593 at 606; *Edmunds v Edmunds* [1904] P 362 at 374; *Security Trust Co v Royal Bank of Canada* [1976] AC 503, [1976] 1 All ER 381, PC; *Alan Estates Ltd v WG Stores Ltd* [1982] Ch 511, [1981] 3 All ER 481, CA (lease and counterpart delivered in escrow: lease took effect from date of delivery).

5 *Thompson v McCullough* [1947] KB 447 at 455, [1947] 1 All ER 265 at 268, CA, per Morton LJ; *Terrapin International Ltd v IRC* [1976] 2 All ER 461, [1976] 1 WLR 665 (when a document originally delivered as an escrow became effective as a deed, stamp duty was held to attach at the rate applicable at that date).

6 *Security Trust Co v Royal Bank of Canada* [1976] AC 503, [1976] 1 All ER 381, PC.

7 *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1, CA( affd sub nom *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL); and see the cases cited in note 4 supra. It is thought that for this reason (amongst others) a person cannot make a conveyance valid at law of some legal estate or property in lands or goods, which he has not, but merely expects to have, by delivering a deed, purporting to convey such estate or interest, as an escrow to take effect when such estate or interest is assured to him (see 2 Williams on Vendor and Purchaser (3rd Edn) 1184-1185 n (d)). In *Jennings v Bragg* (1595) Cro Eliz 447, what was in effect decided was that the first delivery of the deed to the stranger off the land was null and void, and was not a good delivery as an escrow, and that the only valid delivery of the deed was that made on the land. It seems obvious that the court put a benevolent construction on the facts (compare the rule laid down in *Butler and Baker's Case* (1591) 3 Co Rep 25a, Ex Ch; *Xenos v Wickham* (1866) LR 2 HL 296 at 312 per Blackburn J). But it is equally obvious that the court put this construction on the facts to avoid the effect of the rule of law (which was thus impliedly acknowledged) that a person who has no estate in land (such as a disseisee) cannot make a valid lease thereof except by estoppel: see *Stephens v Eliot* (1596) Cro Eliz 484. In 2 Preston's Abstracts of Title (2nd Edn) 400, it is stated that a lease made by a disseisee of land by way of escrow to take effect as a deed when he should have re-entered would be inoperative in its inception and could not be made good by a second delivery after he had re-entered, and cites *Jennings v Bragg* (1595) Cro Eliz 447, in support of that proposition; but that case does not support the latter part of the statement in Preston, for the gist of the case is that the first delivery was altogether null and void, and therefore the second might take effect as the only delivery. It is submitted that this is so, notwithstanding the statement in Co Litt 48b.

8 See the cases cited in note 4 supra; *Frosett v Walshe* (1616) J Bridg 49 at 51; *Newton v Metropolitan Rly Co* (1861) 10 WR 102.

9 *Hare v Horton* (1833) 5 B & Ad 715 at 728-730.

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## **(v) Execution in the case of Corporations, Companies etc**

### **40. Sealing and delivery.**

At common law the deed of a corporation must necessarily be under seal and requires to be delivered as well as sealed<sup>1</sup>. There is a rebuttable presumption that sealing by a corporation imports delivery<sup>2</sup>.

It is now provided, however, that a company formed and registered under the Companies Act 1985<sup>3</sup> does not need to have a common seal<sup>4</sup>.

1 See PARAS 27, 32 ante; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1261 et seq.

2 *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA.

3 For the meanings of 'company' and 'existing company' see COMPANIES vol 14 (2009) PARA 24.

4 See the Companies Act 1985 s 36A (as added and amended); para 41 post; and COMPANIES vol 14 (2009) PARA 288. As to companies incorporated outside Great Britain see the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994/950 (as amended); and COMPANIES vol 14 (2009) PARA 288.

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#### **41. Mode of execution.**

Where by the constitution of a corporation any special mode of execution of its deeds is prescribed, or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation, in order to be completely binding, must be executed in the manner or with every formality so prescribed<sup>1</sup>. In practice most cases are covered by particular statutory provisions.

In relation to a company formed and registered under the Companies Act 1985<sup>2</sup>, it is provided that a document is executed by a company by the affixing of its common seal<sup>3</sup>. A company is no longer required to have a common seal<sup>4</sup>, however, and there are further provisions which apply whether it does or not<sup>5</sup>. Thus a document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company<sup>6</sup>. A document is validly executed by a company as a deed<sup>7</sup> if and only if it is duly executed by the company, and it is delivered as a deed<sup>8</sup>. Finally, in favour of a purchaser<sup>9</sup> a document is deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company<sup>10</sup>. So also the deeds of building societies incorporated under the Building Societies Act 1986<sup>11</sup>, and of societies incorporated under the Industrial and Provident Societies Act 1965<sup>12</sup>, must be executed as required by the rules of the society.

In favour of a purchaser<sup>13</sup>, however, a deed executed after 1925 is deemed to have been duly executed by a corporation aggregate if a seal purporting to be the seal of the corporation has been affixed to it, in the presence of and attested by persons purporting to hold certain specified offices<sup>14</sup>; and, even apart from this provision, where a document appears on its face to comply with any formalities required by the constitution of the corporation, the corporation may be estopped from setting up any irregularity which is a matter of its internal management, though it will not be estopped in circumstances amounting to forgery<sup>15</sup>.

1 See *Clarke v Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315 at 324-326; and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1261 et seq.

2 For the meanings of 'company' and 'existing company' see COMPANIES vol 14 (2009) PARA 24.

3 See the Companies Act 1985 s 36A(2) (as added); and COMPANIES vol 14 (2009) PARA 288. As to companies regulated by the Companies Clauses Acts see COMPANIES vol 15 (2009) PARA 992 et seq.

4 See the Companies Act 1985 s 36A(3) (as added); and COMPANIES vol 14 (2009) PARA 288.

5 See *ibid* s 36A(3)-(8) (as added and amended); and COMPANIES vol 14 (2009) PARA 288. See note 6 *infra*.

6 See *ibid* s 36A(4) (as added); and COMPANIES vol 14 (2009) PARA 288. See also s 36A(4A) (as added), which covers the situation where the document is to be signed by a person as a director or the secretary of more than one company, in which case the document is not taken to be duly signed by that person for the purposes of s 36A(4) (as added) unless the person signs it separately in each capacity; and see COMPANIES vol 14 (2009) PARA 288.

Section 36A (as added and amended) applies in the case of a document which is (or purports to be) executed by a company in the name or on behalf of another person whether or not that person is also a company; and for the purposes of s 36A (as added and amended), a document is (or purports to be) signed, in the case of a director or the secretary of a company which is not an individual, if it is (or purports to be) signed by an

individual authorised by the director or secretary to sign on its behalf: see s 36A(7), (8) (as added); and COMPANIES vol 14 (2009) PARA 288.

7     le for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)(b) (as amended): see PARA 8 ante.

8     See the Companies Act 1985 s 36AA(1) (as added); and COMPANIES vol 14 (2009) PARA 288. A document is presumed to be delivered for these purposes upon its being executed, unless a contrary intention is proved: see s 36AA(2) (as added); and COMPANIES vol 14 (2009) PARA 288.

9     For the meaning of 'purchaser' see COMPANIES vol 14 (2009) PARA 288.

10    See the Companies Act 1985 s 36A(6) (as added and amended); and COMPANIES vol 14 (2009) PARA 288. See note 6 supra.

11    See the Building Societies Act 1986 s 5 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1865, 1881.

12    See the Industrial and Provident Societies Act 1965 s 1 (as amended), s 3, Sch 1 para 13 (as substituted); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2402, 2414, 2416, 2425.

13    For the meaning of 'purchaser' see PARA 34 note 6 ante.

14    See the Law of Property Act 1925 s 74(1), (1A), (1B), (5) (s 74(1) as substituted, s 74(1A), (1B) as added); and CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1264-1265, 1267. Sealing in accordance with s 74(1) (as substituted) does not constitute delivery: *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66, [2004] 4 All ER 238.

15    See COMPANIES vol 14 (2009) PARA 268. The validity of an act done by a company cannot be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see the Companies Act 1985 s 35(1) (as substituted); and COMPANIES vol 14 (2009) PARA 265. In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the companies constitution: see s 35A(1) (as added); and COMPANIES vol 14 (2009) PARA 263. A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so: see s 35B (as added); and COMPANIES vol 14 (2009) PARA 263. See further COMPANIES vol 14 (2009) PARAS 256, 263.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(v) Execution in the case of Corporations, Companies etc/42. Seal of company etc.

## **42. Seal of company etc.**

A company which has a common seal<sup>1</sup> is required to have its name engraved in legible characters on the seal<sup>2</sup>, and if an officer of the company or a person on its behalf uses or authorises the use of any seal purporting to be the seal of the company on which its name is not engraved he is liable to a fine<sup>3</sup>.

A society registered under the Industrial and Provident Societies Act 1965<sup>4</sup> must have its registered name engraved in legible characters on relevant notices and publications<sup>5</sup>, and the society's rules must make provision for the custody and use of the society's seal if it has one<sup>6</sup>.

In the absence of any special or legally binding regulations, the seal of a corporation is not required to bear any special emblems<sup>7</sup>.

1 A company is no longer required to have a common seal: see the Companies Act 1985 s 36A(3) (as added); para 41 ante; and COMPANIES vol 14 (2009) PARA 288.

2 If it fails to comply with this requirement it is liable to a fine: see *ibid* s 350(1) (as substituted); and COMPANIES vol 14 (2009) PARAS, 220, 283.

3 *Ibid* s 350(2). See further COMPANIES vol 14 (2009) PARAS 220, 283.

4 See the Industrial and Provident Societies Act 1965 s 2 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2413-2415.

5 See *ibid* s 5(6) (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2441.

6 See *ibid* s 1(1), Sch 1 para 13 (as substituted); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2425, 2445.

7 See further CORPORATIONS vol 9(2) (2006 Reissue) PARA 1122 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(v) Execution in the case of Corporations, Companies etc/43. Trustees of a charity incorporated as a body corporate.

#### **43. Trustees of a charity incorporated as a body corporate.**

Where the trustees<sup>1</sup> of a charity<sup>2</sup> have become an incorporated body<sup>3</sup> there are special provisions as respects the execution of documents<sup>4</sup> by the incorporated body<sup>5</sup>. If an incorporated body has a common seal, a document may be executed by the body by the affixing of its common seal<sup>6</sup>. Whether or not it has a common seal, a document may be executed by an incorporated body<sup>7</sup>: (1) by being signed by a majority of the trustees of the relevant charity<sup>8</sup> and expressed (in whatever form of words) to be executed by the body<sup>9</sup>; or (2) by being executed in pursuance of an authority duly given by the trustees of the relevant charity<sup>10</sup>. It is provided that such trustees may, subject to the trusts<sup>11</sup> of the charity, confer on any two or more of its number a general authority, or an authority limited in such manner as the trustees think fit, to execute in the name and on behalf of the body documents for giving effect to transactions to which the body is a party<sup>12</sup>. It is further provided that in any such authority to execute a document in the name and on behalf of an incorporated body there is, unless the contrary intention appears, implied authority also to execute it for the body in the name and on behalf of the official custodian for charities<sup>13</sup> or of any other person, in any case in which the trustees could do so<sup>14</sup>. A document duly executed by an incorporated body which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it is presumed, unless a contrary intention is proved, to be delivered upon its being so executed<sup>15</sup>.

1 For the meaning of 'trustees' see CHARITIES vol 8 (2010) PARA 260.

2 For the meaning of 'charity' see CHARITIES vol 8 (2010) PARA 1 et seq.

3 For the meaning of 'incorporated body' see CHARITIES vol 8 (2010) PARA 260.

4 For the meaning of 'document' see CHARITIES vol 8 (2010) PARA 260.

5 See the Charities Act 1993 s 60(1). See further CHARITIES vol 8 (2010) PARA 261.

6 Ibid s 60(2).

7 Ibid s 60(3).

8 For the meaning of 'the relevant charity' see CHARITIES vol 8 (2010) PARA 260.

9 Charities Act 1993 s 60(3)(a).

10 Ibid s 60(3)(b).

11 For the meaning of 'trusts' see CHARITIES vol 8 (2010) PARA 217.

12 Charities Act 1993 s 60(4). Such an authority: (1) suffices for any document if it is given in writing or by resolution of a meeting of the trustees of the relevant charity, notwithstanding the want of any formality that would be required in giving an authority apart from s 60(4) (s 60(5)(a)); (2) may be given so as to make the powers conferred exercisable by any of the trustees, or may be restricted to named persons or in any other way (s 60(5)(b)); (3) subject to any such restriction, and until it is revoked, notwithstanding any change in the trustees of the relevant charity, has effect as a continuing authority given by the trustees from time to time of the charity and exercisable by such trustees (s 60(5)(c)).

13 Ibid s 97(1).

14 Ibid s 60(6).



15 Ibid s 60(7). In favour of a purchaser a document is deemed to have been duly executed by such a body if it purports to be signed: (1) by a majority of the trustees of the relevant charity; or (2) by such of the trustees of the relevant charity as are authorised by the trustees of that charity to execute it in the name and on behalf of the body, and, where the document makes it clear on its face that it is intended by the person or persons making it to be a deed, it is deemed to have been delivered upon its being executed: s 60(8). For this purpose, 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: s 60(8).

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## **(vi) Execution in Various Special Cases**

### **44. Dispositions of registered land.**

Dispositions of registered land must be effected in the prescribed manner<sup>1</sup>. This is dealt with elsewhere in this work<sup>2</sup>.

1 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 914 et seq.

2 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 906 et seq. As to electronic dispositions and electronic conveyancing generally see PARA 9 ante; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1049 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/45. Deeds executed by clerics.

**45. Deeds executed by clerics.**

A deed of relinquishment of holy orders made in pursuance of the Clerical Disabilities Act 1870 must be executed in the presence of a witness<sup>1</sup>.

<sup>1</sup> See the Clerical Disabilities Act 1870 s 3(1), Sch 2; and ECCLESIASTICAL LAW vol 14 para 686 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/46. Mentally disordered persons.

#### **46. Mentally disordered persons.**

Where a person suffering from mental disorder<sup>1</sup> has a legal estate<sup>2</sup> in land<sup>3</sup> (whether settled<sup>4</sup> or not) vested in him, either solely or jointly with any other person or persons, his receiver<sup>5</sup> or any person authorised must, under an order of the authority having jurisdiction under Part VII of the Mental Health Act 1983<sup>6</sup>, or of the court<sup>7</sup>, or under any statutory power, make or concur in making all requisite dispositions for conveying<sup>8</sup> or creating a legal estate in his name and on his behalf<sup>9</sup>. Even where this statutory provision does not apply, it is usual for the person authorised to execute a deed on behalf of a mentally disordered person to do so in the latter's name; and a deed settled by the court will normally be drawn for execution in this manner<sup>10</sup>.

If land subject to a trust of land<sup>11</sup> is vested, either solely or jointly with any other person or persons, in a person who is incapable, by reason of mental disorder, of exercising his functions as trustee, a new trustee must be appointed in the place of that person, or he must be otherwise discharged from the trust, before the legal estate is dealt with by the trustees<sup>12</sup>.

1 For these purposes, 'mental disorder' has the meaning assigned to it by the Mental Health Act 1983 s 1 (see MENTAL HEALTH vol 30 (Reissue) PARA 402): Law of Property Act 1925 s 205(1)(xiii) (definition substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and amended by the Mental Health Act 1983 s 148, Sch 4 para 5(b)). This provision is repealed by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 4(1), (3), Sch 7 as from a day to be appointed under s 68(1). At the date at which this volume states the law no such day had been appointed.

2 'Legal estates' means the estates, interests and charges, in or over land (subsisting or created at law) which are by the Law of Property Act 1925 authorised to subsist or to be created as legal estates: s 205(1)(x).

3 As to the meaning of 'land' see PARA 14 note 2 ante.

4 For these purposes, 'settled land' has the same meaning as in the Settled Land Act 1925 ss 2, 117(1)(xxiv) (see SETTLEMENTS vol 42 (Reissue) PARA 680): Law of Property Act 1925 s 205(1)(xxvi).

5 'Receiver', in relation to a person suffering from mental disorder, means a receiver appointed for that person under the Mental Health Act 1959 Pt VIII (ss 100-121) (repealed) or the Mental Health Act 1983 Pt VII (ss 93-113) (as amended; prospectively amended and repealed) (see MENTAL HEALTH vol 30 (Reissue) PARA 674 et seq): Law of Property Act 1925 s 205(1)(xiii) (definition as substituted and amended; prospectively repealed (see note 1 supra)).

6 I.e the Mental Health Act 1983 Pt VII (as amended; prospectively repealed): see MENTAL HEALTH vol 30 (Reissue) PARA 674 et seq.

7 Unless the contrary intention appears, 'the court' means the High Court or the county court, where those courts respectively have jurisdiction: Law of Property Act 1925 s 203(3) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II).

8 For the meaning of 'conveying' see PARA 14 note 1 ante.

9 Law of Property Act 1925 s 22(1) (s 22 substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt I; and the Law of Property Act 1925 s 22(1) amended by the Mental Health Act 1983 s 148, Sch 4 para 5(a)). As from a day to be appointed the Law of Property Act s 22(1) is further amended so as to refer to a person lacking capacity under the Mental Capacity Act 2005 (instead of a person suffering from a mental disorder) and so as to refer to a deputy appointed by the Court of Protection (instead of a receiver): Law of Property Act 1925 s 22(1) (as so substituted and amended; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 4(1), (2) (a), (b)). At the date at which this volume states the law no such day had been appointed.

As to the powers of a judge or court in respect of the property of a mentally disordered person see the Trustee Act 1925 ss 44(ii)(a), 51(1)(ii)(a), 54 (as substituted and amended; prospectively amended); the Mental Health Act 1983 ss 95-100 (as amended; prospectively repealed); and MENTAL HEALTH vol 30 (Reissue) PARA 681 et seq.

10 Execution by the person authorised in his own name may be sufficient where it is apparent from the deed that he was acting on behalf of the mentally disordered individual as the person so authorised: *Lawrie v Lees* (1881) 7 App Cas 19, HL. See also PARA 30 note 8 ante.

11 'Trust of land' means any trust of property which consists of or includes land: Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(a); Interpretation Act 1978 s 5, Sch 1 (definition added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 16); and see REAL PROPERTY vol 39(2) (Reissue) PARA 66. As to the creation of trusts of land see SETTLEMENTS vol 42 (Reissue) PARAS 897-899. As to trustees of land see SETTLEMENTS vol 42 (Reissue) PARA 900 et seq.

12 Law of Property Act 1925 s 22(2) (as substituted (see note 9 supra); and amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4). As from a day to be appointed the Law of Property Act s 22(2) is further amended so as to refer to a person lacking capacity under the Mental Capacity Act 2005 (instead of a person suffering from a mental disorder): Law of Property Act 1925 s 22(2) (as so substituted and amended; prospectively amended by the Mental Capacity Act 2005 Sch 6 para 4(1), (2)(b)). At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **46 Mentally disordered persons**

NOTES 1, 9, 12--Day now appointed: SI 2007/1897.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/47. Deeds executed by attorney.

#### **47. Deeds executed by attorney.**

Where a deed is to be executed by attorney, the instrument creating a power of attorney must be executed as a deed by the donor of the power<sup>1</sup>. The deed executed by attorney must be so expressed that it is apparent that the act evidenced by it is the act of the principal and not of the attorney, and if the deed is between parties the principal, and not the attorney, must be named as a party thereto, in order that the principal may enjoy the advantages given by law only to parties to the deed<sup>2</sup>.

A company may, by writing under its common seal<sup>3</sup>, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom<sup>4</sup>. A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company's common seal<sup>5</sup>.

1 Powers of Attorney Act 1971 s 1(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1, Sch 1 para 6(a)). As to the formalities of execution see PARAS 31-33 ante. See also PARA 13 note 1 ante; and AGENCY.

2 *Frontin v Small* (1726) 2 Ld Raym 1418; *White v Cuyler* (1795) 6 Term Rep 176; *Berkeley v Hardy* (1826) 5 B & C 355. See also PARA 61 post.

3 Note that companies are no longer required to have a common seal: see the Companies Act 1985 s 36A (as added and amended); para 41 ante; and COMPANIES vol 14 (2009) PARA 288.

4 Ibid s 38(1) (amended by the Companies Act 1989 s 130(7), Sch 17 para 1; and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 74, Sch 8 Pt II para 33, Sch 9). See further COMPANIES vol 14 (2009) PARA 289. 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

5 Companies Act 1985 s 38(2) (substituted by the Companies Act 1989 Sch 17 para 1(3)).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/48. Deeds exercising powers.

#### **48. Deeds exercising powers.**

Where any instrument conferring a power of appointment provides that the power is exercisable by deed to be executed with some further or other formality than is required by the general law applicable to the execution of deeds<sup>1</sup>, a deed exercising the power may be executed either: (1) in strict compliance with all the requirements of the instrument creating the power; or (2) in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested<sup>2</sup>. To operate as a valid execution of the power it must be executed with all the formalities prescribed by one of these two methods of execution<sup>3</sup>. The second method of execution only excuses exact compliance with the terms of the instrument creating the power in so far as that instrument requires the actual execution and attestation of the deed or instrument exercising the power to be accomplished in some other or more formal manner than is required by the general law. It does not operate to defeat any direction in that instrument that the consent of any particular person is to be necessary to a valid execution, or that, in order to give validity to any appointment under the power, any act is to be performed having no relation to the mode of executing and attesting the instrument exercising the power<sup>4</sup>.

Thus a deed exercising a power of appointment which was made exercisable by deed to be executed in the presence of and attested by a witness must be so executed and attested, or it will not be a good execution of the power<sup>5</sup>. A deed exercising a power of appointment which was made exercisable by deed to be executed in the presence of and attested by two or by any greater number of witnesses must be executed in the presence of and attested by two witnesses at least, or it will not be a good execution of the power<sup>6</sup>.

1 See PARA 27 et seq ante.

2 See the Law of Property Act 1925 s 159(1), (3), (4); *Holmes v Coghill* (1802) 7 Ves 499 at 506 per Grant MR; *Hawkins v Kemp* (1803) 3 East 410 at 439-440; *Reid v Shergold* (1805) 10 Ves 370 at 380; Sugden, Treatise on Powers (8th Edn) 206 et seq; Williams and Eastwood on Real Property 240. The defective execution of a power will, however, be aided, even against purchasers from those claiming in default of appointment, if the intended appointee was a purchaser from or the wife or a child or a creditor of the person, who purported to exercise the power, or if the appointment purported to be made was for a charitable purpose: Sugden, Treatise on Powers (8th Edn) 533-536, 542. This relief is only granted to remove defects regarded as not being of the essence of the power, such as the absence of a seal or of a witness or witnesses: Sugden, Treatise on Powers (8th Edn) 548 et seq.

3 See note 2 supra.

4 See the Law of Property Act 1925 s 159(2). As to the execution of powers see generally POWERS.

5 *Earl of Mountague v Earl of Bath* (1693) (as reported in 3 Cas in Ch 55 at 65, 70, 72, 86); *Hawkins v Kemp* (1803) 3 East 410; Sugden, Treatise on Powers (8th Edn) 206-207. The deed may be attested by more witnesses than one: Sugden, Treatise on Powers (8th Edn) 247.

6 See notes 2-5 supra.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/49. Attestation clauses of deeds exercising powers.

#### **49. Attestation clauses of deeds exercising powers.**

Where deeds exercising powers are required by the instrument creating the power to be executed with some additional formality to be performed in the presence of a witness or witnesses, and are also required to be attested, then, if it is proposed to execute the deed in strict compliance with the terms of the power<sup>1</sup>, the attestation clause should expressly state that every formality required to be performed has been duly gone through in the presence of the proper number of witnesses<sup>2</sup>. In such a case, if the instrument creating the power requires two or more formalities to be observed, and the attestation clause states only that one of them has been complied with, the power is not well executed<sup>3</sup>. If, however, the circumstances are such that it must necessarily be inferred that all the formalities were duly gone through the power is sufficiently executed<sup>4</sup>, although the attestation clause expressly mentions the observance of some or one only of the formalities required<sup>5</sup>; and if the terms of the attestation are general, purporting simply to bear witness to the execution of the deed without specifying in particular the manner of such execution or stating any of the formalities then observed, it will be implied that the required formalities were duly performed and the power will be well executed<sup>6</sup>. Where such a deed is executed in reliance on the provisions of the Law of Property Act 1925<sup>7</sup>, the power is well executed if the attestation clause is expressed in the form in which deeds are ordinarily attested.

1 See PARA 48 ante.

2 See Sugden, *Treatise on Powers* (8th Edn) 234-238, 245, 247; and note 3 infra.

3 *Wright v Wakeford* (1811) 17 Ves 454; *Doe d Mansfield v Peach* (1814) 2 M & S 576; *Wright v Barlow* (1815) 3 M & S 512; *Vincent v Bishop of Sodor and Man* (1851) 4 De G & Sm 294 at 307; and see Sugden, *Treatise on Powers* (8th Edn) 234-238, 244-247.

4 *Re Wrey's Trust* (1850) 17 Sim 201; *Vincent v Bishop of Sodor and Man* (1851) 4 De G & Sm 294; *Smith v Adkins* (1872) LR 14 Eq 402; and see Farwell, *Treatise on Powers* (3rd Edn) 156.

5 See note 4 supra.

6 *Burdett v Spilsbury* (1843) 10 Cl & Fin 340, HL; and see Sugden, *Treatise on Powers* (8th Edn) 240-241; Farwell, *Treatise on Powers* (3rd Edn) 157.

7 See the Law of Property Act 1925 s 159; and PARA 48 ante.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/50. Conflict of laws.

## **50. Conflict of laws.**

The rules of private international law which govern capacity to contract<sup>1</sup> and the essential validity, interpretation and effect of contracts<sup>2</sup> are dealt with elsewhere in this work. The form, as distinct from the essentials, of a contract must in general comply either with the law of the place where the contract is made or the proper law of the contract, that is the law which the parties intended or are presumed to have intended to govern it<sup>3</sup>.

In the case of assignment of property, certain special rules apply. For example, in the case of an immovable<sup>4</sup>, both the capacity of the parties and the form required for a valid assignment depend upon the law of the country where the immovable is situated<sup>5</sup>.

1 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 364.

2 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 362 et seq. See also PARA 166 text and note 10 post.

3 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 363.

4 For the distinction between immovables and movables see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 380.

5 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 399. As to the law determining the validity of an assignment of movables see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 405 et seq. For the application of the principle of renvoi or reference back in determining what system of law is to be applied see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 6 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vi) Execution in Various Special Cases/51. Appointment and discharge of charity trustees by a meeting.

**51. Appointment and discharge of charity trustees by a meeting.**

Deeds evidencing the appointment, or discharge, of a charity trustee by a meeting and made under the provisions of the Charities Act 1993 relating to the vesting of the charity property on such an appointment or discharge<sup>1</sup> must be executed either at the meeting by the person presiding or in some other manner directed by the meeting and must be attested by two persons present at the meeting<sup>2</sup>.

1 See the Charities Act 1993 s 83; and CHARITIES vol 8 (2010) PARAS 280-281.

2 See *ibid* s 83(1), (2); and CHARITIES vol 8 (2010) PARAS 280-281.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vii) Conditional and Partial Execution and Re-execution/52. Conditional execution.

## **(vii) Conditional and Partial Execution and Re-execution**

### **52. Conditional execution.**

Where a deed is executed by some party or parties to the deed on the condition that the other party or parties to it, or some or one of such parties, shall execute it, it is in fact delivered as an escrow and will not take effect completely as a deed until the condition has been performed<sup>1</sup>.

<sup>1</sup> See PARAS 37-39 ante, 62 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vii) Conditional and Partial Execution and Re-execution/53. Partial execution.

### **53. Partial execution.**

It is impossible in law to execute a deed as to part only of its provisions; and the attempted execution of a deed with some proviso purporting to qualify the liability of the executing party, or to express his dissent to be bound by some provision contained in it, is not a perfect execution of the deed, and, as against any person entitled to have the deed executed by the party attempting a partial execution, it is no execution of the deed<sup>1</sup>. It appears, however, that, as against the party so executing a deed, a partial execution may be effectual, and the qualifying proviso may be rejected as repugnant and void<sup>2</sup>. If the party attempting a partial execution accepts some benefit under or otherwise confirms the deed, he is bound by its provisions as if he had completely executed it<sup>3</sup>.

1 *Wilkinson v Anglo-Californian Gold Mining Co* (1852) 18 QB 728; *Exchange Bank of Yarmouth v Blethen* (1885) 10 App Cas 293 at 298, PC; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75.

2 *Exchange Bank of Yarmouth v Blethen* (1885) 10 App Cas 293 at 299, PC; and see PARA 64 note 1 post.

3 *Exchange Bank of Yarmouth v Blethen* (1885) 10 App Cas 293 at 299, PC; and see PARA 64 note 1 post. As to the effect of execution by one or some parties only see PARA 62 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vii) Conditional and Partial Execution and Re-execution/54. Re-execution of void deed.

#### **54. Re-execution of void deed.**

When a deed has once been effectually executed, either as a deed or as an escrow, and remains unaltered or uncanceled, it cannot well be executed again, and any attempted re-execution of the deed will have no effect. If, however, delivery of a deed is attempted, in such a way that the attempt is altogether null and void, the deed may again be delivered in circumstances sufficient to make it the effective instrument of the delivering party; and in such a case the later delivery, coupled with the acknowledgment of the sealing implied in such delivery where sealing is required<sup>1</sup>, completes the only true and valid execution of the deed<sup>2</sup>.

A writing which has been delivered with a blank so left in a material part of it that it is altogether void for uncertainty may be re-executed after the blank has been filled up, and will then for the first time become the deed of the party so executing it<sup>3</sup>.

1 This provision does not apply in the case of an instrument delivered before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force), where a seal was required: see s 1(11); and PARA 7 ante. As to the application of s 1(1)(b) see s 1(9), (10); and PARAS 7, 27, 32 ante. See also PARAS 27, 32, 40 et seq ante.

2 Shep Touch 60; Perkins, Laws of England s 154; *Jennings v Bragg* (1595) Cro Eliz 447; 3 Co Rep 35b, 36a (see PARA 39 note 7 ante); Vin Abr, Faits (N); *Goodright d Carter v Straphan* (1774) 1 Cowp 201 at 203-204; *Cole v Parkin* (1810) 12 East 471; *Tupper v Foulkes* (1861) 9 CBNS 797; and see *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 561-563, CA; *Re Seymour, Fielding v Seymour* [1913] 1 Ch 475, CA.

3 See PARAS 28 note 3 ante, 56 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(3) EXECUTION OF A DEED/(vii) Conditional and Partial Execution and Re-execution/55. Re-execution of voidable deed.

## **55. Re-execution of voidable deed.**

If a deed, when delivered, was voidable but not altogether void, as for duress or by reason of the minority of the party making it<sup>1</sup>, its redelivery alone after the constraint has ceased or he has attained full age will be inoperative<sup>2</sup>. If he should then re-execute, that is, re-sign as well as redeliver the deed, it would be binding<sup>3</sup>; and redelivery after attaining full capacity might, perhaps, be so made as to import an acknowledgment of his signature and the seal already attached as his seal, which would be equivalent to re-execution<sup>4</sup>.

1 See PARA 67 et seq post.

2 See PARAS 39 note 7, 54 note 2 ante, 68 post.

3 In the case of redelivery before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see PARA 7 note 4 ante), resealing was required in every case. It is now unnecessary because, subject to certain exceptions, a seal is no longer required for execution of a deed by an individual: see s 1(1)(b), (9), (10); and PARAS 7, 27, 32 ante. As to the application of s 1(1)(b) see s 1(9); and PARAS 7, 27, 32 ante. Strictly speaking, resealing imports taking the old seal off and putting a new one on: see *Bro Abr, Facts*, 78, 98; *Vin Abr, Facts (N)*, pl 11. This need not actually be done; a new acknowledgment by the party of the existing seal as his will be sufficient (see note 4 infra).

4 See PARA 27 ante. It is a question of fact, to be determined from the circumstances of the case, whether resealing where required (see PARA 27 et seq ante) should be implied from the redelivery: see PARAS 27 text and note 2, 31 note 8 ante.

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## **56. Re-execution after alteration or cancellation.**

If a deed originally well executed is afterwards made void by reason of some alteration or erasure being made in a material part of it or of its having been cancelled<sup>1</sup>, it may be re-executed by conduct amounting to a redelivery, and will then be binding on the party whose deed it is in its altered state<sup>2</sup>.

Where a deed which was valid when originally executed has afterwards been cancelled or altered in a material part and is subsequently re-executed, it must be restamped<sup>3</sup>.

1 See PARAS 76-77 post.

2 *Hudson v Revett* (1829) 5 Bing 368 at 371; *Hibblewhite v M'Morine* (1840) 6 M & W 200 at 215; *Tupper v Foulkes* (1861) 9 CBNS 797 at 807-808 per Williams J.

3 See PARA 84 note 3 post.

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## **(4) EFFECT OF A DEED**

### **57. General effect.**

By executing a deed in accordance with all the requirements for such execution<sup>1</sup>, the party whose act and deed it is becomes, as a general rule, conclusively bound by what he is stated in the deed to be effecting, undertaking or permitting<sup>2</sup>. He is, in general, so bound even though another party has not executed the deed<sup>3</sup>, or he has himself executed it in a false name<sup>4</sup>. He is, as a rule, estopped from averring and proving by extrinsic evidence that the contents of the deed did not in truth express his intentions or did not correctly express them, or that there are reasons why he should not be obliged to give effect to the deed. This is equally the case whether the deed is expressed to operate as a conveyance of property or as a contract or otherwise<sup>5</sup>. In a claim founded on the deed, an executing party is also in general estopped from denying the truth of a precise and unambiguous representation of fact contained in the deed where the representation is material to the transaction effected by the deed and appears clearly enough to have been made or adopted by him with a view to the other party's relying on it<sup>6</sup>. However, to all these general principles there are exceptions, cases where the deed may be a nullity or may be avoided or corrected<sup>7</sup>.

1 See PARAS 1 et seq, 27-34 ante. An instrument intended in a certain event to be an effective deed may be delivered as an escrow, ie so as to become the delivering party's act and deed only if the event occurs: see PARAS 37-39 ante.

2 See PARA 65 post.

3 *Lady Naas v Westminster Bank Ltd*[1940] AC 366 at 374-375, [1940] 1 All ER 485 at 489, HL. As to the effect of non-execution by a party see further PARA 62 post.

4 See PARA 69 note 1 post. A person whose execution of a deed has been forged is also estopped from denying that he is bound by the deed if, after becoming aware of the forgery, he delays in informing the person ostensibly entitled to the benefit of the deed, so causing detriment to the latter: *Fung Kai Sun v Chan Fui Hing*[1951] AC 489 at 503, 506, PC; and see PARA 72 post. As to estoppel generally see ESTOPPEL.

5 Littleton's Tenures ss 58, 693; Co Litt 45a, 47b, 352a, 363b; 1 Plowd 308-309; *Whelpdale's Case* (1604) 5 Co Rep 119a; *Style v Hearing* (1605) Cro Jac 73; 2 Bl Com (14th Edn) 295, 446; *Xenos v Wickham*(1866) LR 2 HL 296.

6 See *Greer v Kettle*[1938] AC 156 at 166-167, [1937] 4 All ER 396 at 401, HL; and ESTOPPEL vol 16(2) (Reissue) PARA 1014 et seq.

7 See PARAS 60, 62-63, 67, 88 post.



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## 58. Rule against derogation.

It is a well-established rule that a grantor cannot be permitted to derogate from his grant<sup>1</sup>. Though usually applied to sales and leases of land, it is of wider application<sup>2</sup>. The principle is that if one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the enjoyment of that benefit, because that would be to take away with one hand what is given with the other<sup>3</sup>. Hence, on the grant by the owner of a tenement of part of that tenement there will pass to the grantee all those easements which are necessary in order that the property may be enjoyed reasonably for the purpose for which it was granted<sup>4</sup>. On the other hand, if the grantor intends to reserve any right over the tenement granted, he must do so expressly, though to this rule there are certain exceptions, notably in cases of what are known as ways of necessity<sup>5</sup>.

Where a man sells or lets land for a particular purpose, it is always subject to the proviso that it is lawful to carry on that purpose. Neither the buyer nor the tenant can pray in aid the doctrine of derogation from grant so as to enable him to do something which is unlawful<sup>6</sup>.

1 *Wheeldon v Burrows* (1879) 12 ChD 31 at 49, CA, per Thesiger LJ; *Browne v Flower* [1911] 1 Ch 219; *Re Webb's Lease, Sandom v Webb* [1951] Ch 808 at 831-832, [1951] 2 All ER 131 at 146, CA, per Morris LJ; *Cable v Bryant* [1908] 1 Ch 259 (right to access of air); *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587 at 593, [1970] 1 WLR 1185 at 1194; *Lyme Valley Squash Club Ltd v Newcastle under Lyme Borough Council* [1985] 2 All ER 405. For examples of the application of the doctrine in relation to the implied grant or reservation of easements see EASEMENTS AND PROFITS A PRENDRE. In relation to tenancies see *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437; *Chartered Trust plc v Davies* (1997) 76 P & CR 396, [1997] 2 EGLR 83, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 276, 520. A quasi easement must also be continuous and apparent: see *Wheeler v JJ Saunders Ltd* [1996] Ch 19, [1995] 2 All ER 697, CA; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 71.

2 See *Molton Builders Ltd v City of Westminster London Borough Council* (1975) 30 P & CR 182, 119 Sol Jo 627, CA; *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] AC 577, [1986] 1 All ER 850, HL (car owners have an inherent right to repair their cars in the most economical way possible and for that purpose to have access to a free market in spare parts for the car; the plaintiffs were not entitled to derogate from that right).

3 See *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225-226, CA, per Younger LJ, who said it was 'a principle which merely embodies in a legal maxim a rule of common honesty'; cited in *Molton Builders Ltd v City of Westminster London Borough Council* (1975) 30 P & CR 182 at 186, CA, per Denning MR. See also *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, CA.

4 *Wheeldon v Burrows* (1879) 12 ChD 31 at 49, CA; *North Eastern Rly Co v Elliott* (1860) 1 John & H 145 at 153 (on appeal sub nom *Elliot v North Eastern Rly Co* (1863) 10 HL Cas 333).

5 *Wheeldon v Burrows* (1879) 12 ChD 31 at 49, CA; *Re Webb's Lease, Sandom v Webb* [1951] Ch 808 at 831, [1951] 2 All ER 131 at 146, CA, per Morris LJ; and, in relation to reservation of sporting rights, cf *Mason v Clarke* [1954] 1 QB 460 at 467-468, [1954] 1 All ER 189 at 192, CA, per Denning LJ (revsd, but not on this point, [1955] AC 778, [1955] 1 All ER 914, HL).

6 *Molton Builders Ltd v City of Westminster London Borough Council* (1975) 30 P & CR 182, 119 Sol Jo 627, CA.

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### 59. Consideration not necessary.

Where a deed makes a gratuitous assurance of any property or right, or expresses in the form of a contractual obligation a gratuitous promise, it is not open to the party who has so made the assurance or promise to aver or prove that he received nothing by way of consideration in return therefor, and the deed will take effect according to its terms notwithstanding the absence of any consideration<sup>1</sup>. Further, a volunteer who is a party to a deed and a direct covenantee is entitled to claim damages for breach of the covenant<sup>2</sup>. This is especially noteworthy in the cases of gratuitous promises expressed in a deed, because a promise made by deed is a specialty<sup>3</sup> and promises which are not specialties are not enforceable unless given for valuable consideration<sup>4</sup>. A party to a deed who has agreed to modify his strict legal rights under it in favour of another party may not be able, if the agreement was intended to be legally binding and has been acted on, to enforce thereafter the strict legal rights in a manner inconsistent with the agreement of modification, even though the agreement was made without consideration and is not in the form of a deed<sup>5</sup>.

In one instance a promise made by deed is not enforceable unless it is made for valuable consideration, and that is where the act or forbearance agreed to be done or observed is in restraint of trade, but is not such as would of itself invalidate the promise for being in unreasonable restraint of trade<sup>6</sup>.

A gratuitous promise made by deed is not equally enforceable with a promise made for valuable consideration, for the courts will not order the specific performance of a voluntary covenant<sup>7</sup>.

Formerly, when land was conveyed without consideration and without a declaration as to whose use the conveyance was made, the use, and with it the estates conveyed, at once resulted to the transferor. Since the repeal of the Statute of Uses<sup>8</sup> in 1925<sup>9</sup>, however, a voluntary conveyance of freehold land expressed to be made simply to the grantee operates according to its tenor to vest the property in the grantee in fee simple for his own benefit<sup>10</sup>.

1 Fitzherbert's Grand Abridgment, Barre 37; *Anon* (1563) Moore KB 47, pl 142; *Pinnel's Case* (1602) 5 Co Rep 117a at 117b; Co Litt 212b; *Spicer v Hayward* (1700) Prec Ch 114; *Shubrick v Salmond* (1765) 3 Burr 1637 at 1639; *Bunn v Guy* (1803) 4 East 190 at 200; *Irons v Smallpiece* (1819) 2 B & Ald 551 at 554 per Abbott CJ; *Wallis v Day* (1837) 2 M & W 273 at 277 per Parke B; *Clough v Lambert* (1839) 10 Sim 174; *Watson v Parker* (1843) 6 Beav 283; *Dickinson v Burrell* (1866) LR 1 Eq 337 at 343. See also *Turner v Vaughan* (1767) 2 Wils 339; *Hill v Spencer* (1767) Amb 641 at 643; *Gray v Mathias* (1800) 5 Ves 286; *Nye v Moseley* (1826) 6 B & C 133; *Hall v Palmer* (1844) 3 Hare 532; *Re Stewart, ex p Pottinger* (1878) 8 ChD 621, CA; *Re Vallance, Vallance v Blagden* (1884) 26 ChD 353; *Re Whitaker, Whitaker v Palmer* [1901] 1 Ch 9, CA.

This effect of a deed has been explained by saying that a deed imports a consideration on account of the solemnity with which it is executed, and this saying has been elevated into a rule of law: 1 Plowd 308-309; Bacon's Law Tracts 310; 2 Bl Com (14th Edn) 446; 1 Fonblanque's Treatise of Equity (5th Edn) 342n; 2 Fonblanque's Treatise of Equity (5th Edn) 26. The truth appears to be that the binding effect of a deed is due to the importance attached in early law to writing as a mode of proof of a person's intention though later it was required that the seal of the person intended to be bound should be affixed to the writing as a guarantee of its authenticity: see PARAS 1, 27 ante. The peculiar effect so attributed by the early common law to a sealed writing has not been affected by the facts that in modern times writing has ceased to be a rare accomplishment, that oral agreements in the way of executory promises have become enforceable at law where valuable consideration has been given in return for the promise, that unsealed writings have been allowed to be produced in evidence of some oral agreement, and that a lease under seal can be varied by an agreement in writing and even by an oral agreement so long as it is evidenced by writing or has been partly performed: *Mitas v Hyams* [1951] 2 TLR 1215 at 1217, CA, per Denning LJ; *Plymouth Corp v Harvey* [1971] 1 All ER 623, [1971] 1 WLR 549. Nor is the binding effect of a deed affected by the fact that a seal is no longer required in the case of instruments executed by an individual and delivered on or after 31 July 1990 (ie the date on which the Law of

Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force): see s 1(1)(b), (11); and PARA 7 ante. As to the application of s 1(1)(b) see s 1(9); and PARAS 7, 27, 32 ante. This does not include execution by a corporation sole: see s 1(10); and PARA 32 ante.

2 *Cannon v Hartley* [1949] Ch 213 at 217, [1949] 1 All ER 50 at 53 per Romer J.

3 Although the word 'specialty' is sometimes used to denote merely a contract contained in a deed, it is more often used (as here) in the sense of meaning a specialty debt or specialty obligation, ie an obligation under a deed or a debt due from or other obligation of the Crown or a debt or other obligation under statute: see *R v Williams* [1942] AC 541 at 555, [1942] 2 All ER 95 at 101, PC; *Royal Trust Co v A-G for Alberta* [1930] AC 144 at 150-151, PC.

4 As to consideration see CONTRACT vol 9(1) (Reissue) PARAS 727-766.

5 *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; and cf CONTRACT vol 9(1) (Reissue) PARA 1030 et seq.

6 The explanation of this is that, as a general rule, all contracts in restraint of trade are void, but promises in reasonable restraint of trade have been admitted to be valid as an exception to this principle, upon condition that they should be made for valuable consideration: see *Davis v Mason* (1793) 5 Term Rep 118 at 120; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL. See also COMPETITION vol 18 (2009) PARA 413.

7 *Colman v Sarrel* (1789) 1 Ves 50 at 55; *Ellison v Ellison* (1802) 6 Ves 656 at 662; *Jefferys v Jefferys* (1841) Cr & Ph 138; *Meek v Kettlewell* (1842) 1 Hare 464 (on appeal (1843) 1 Ph 342); *Denning v Ware* (1856) 22 Beav 184 at 189; *Tatham v Vernon* (1861) 29 Beav 604 at 615; *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697. See SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 805.

8 Statute of Uses (1535) s 1 (repealed).

9 See the Law of Property Act 1925 s 207 (as amended), Sch 7.

10 See *ibid* s 60 (as amended); para 241 post; and EQUITY vol 16(2) (Reissue) PARA 853; REAL PROPERTY vol 39(2) (Reissue) PARAS 93, 119, 245; TRUSTS vol 48 (2007 Reissue) PARA 735. See, however, *Hodgson v Marks* [1971] Ch 892, [1971] 2 All ER 684, CA (where a resulting trust of the beneficial interest to the plaintiff arose out of the voluntary transfer); *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65 at 87, HL, per Lord Browne-Wilkinson. See also GIFTS vol 52 (2009) PARA 242; REAL PROPERTY vol 39(2) (Reissue) PARAS 93, 245.

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## **60. When a deed takes effect.**

A deed takes effect from the time of its delivery, and not from the day on which it is therein stated to have been made or executed; and a party to a deed is not estopped by any statement in the deed as to the day or time of its execution from proving that it was delivered at some other time<sup>1</sup>. If, however, the date of a lease is altered after execution the lessor is estopped from showing that the date inserted by himself in the lease is not the date from which the demise operated, so as to prevent anyone claiming under the lease from relying upon the circumstances existing at the date which the lease bears<sup>2</sup>. A deed may be good although it has no date or bears a false or an impossible date<sup>3</sup>.

1 See PARA 192 post; *Ludford v Gretton* (1576) 2 Plowd 490 at 491; *Goddard's Case* (1584) 2 Co Rep 4b; *Clayton's Case* (1585) 5 Co Rep 1a; *Oshey v Hicks* (1610) Cro Jac 263; Co Litt 46b; Shep Touch 72; *Stone v Bale* (1693) 3 Lev 348; *Hall v Cazenove* (1804) 4 East 477; *Steele v Mart* (1825) 4 B & C 272; *Doe d Lewis v Bingham* (1821) 4 B & Ald 672; *Browne v Burton* (1847) 17 LJQB 49; *Jayne v Hughes* (1854) 10 Exch 430; *Taylor v McCalmont* (1855) 4 WR 59; *Clarke v Roche* (1877) 3 QBD 170; *Leschallas v Woolf* [1908] 1 Ch 641 at 651; *Re Maher and Nugent's Contract* [1910] 1 IR 167. In reckoning a term of years from 'the date' of a deed, the day of the date was held to be included in *English v Cliff* [1914] 2 Ch 376; but see *Cornish v Cawsey* (1648) Aleyn 75; Co Litt 46b; and ESTOPPEL vol 16(2) (Reissue) PARA 1020; TIME vol 97 (2010) PARA 330.

2 *Rudd v Bowles* [1912] 2 Ch 60 at 65 per Neville J.

3 *Goddard's Case* (1584) 2 Co Rep 4b; *Cromwell v Grunsden* (1698) 2 Salk 462.

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## **61. Who may benefit under a deed.**

Any person named or sufficiently indicated in a deed poll may sue to enforce any obligation thereby undertaken in his favour, notwithstanding that he has not executed the deed<sup>1</sup>; but he must observe all stipulations made in the deed of which the performance was a condition precedent to the liability of the maker of the deed<sup>2</sup>. An indenture not inter partes is for this purpose a deed poll<sup>3</sup>.

A person may also take, under a deed inter partes to which he is not named as a party, an interest in remainder<sup>4</sup>, or by way of trust<sup>5</sup>. A power of attorney may be given by a deed made inter partes to a person not named as a party to it<sup>6</sup>.

At common law a person could not take an immediate benefit under an indenture inter partes or maintain an action or claim upon any covenant contained in it unless he were named as a party to the deed<sup>7</sup>. This is still the general rule<sup>8</sup>, but by statute a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, even though he is not named as a party to the conveyance or other instrument<sup>9</sup>. Such covenants, however, cannot be effectually made with persons not in existence at the time of the execution of the deed, as for instance future owners of the land<sup>10</sup>.

The covenants to which this statutory provision<sup>11</sup> applies are confined to those of which the benefit runs with the land<sup>12</sup>, and also to cases where the person seeking to take advantage of it falls within the scope of the instrument according to its true construction<sup>13</sup> and is someone with whom there purports to be a covenant or agreement<sup>14</sup>, as where the instrument purports to confer some interest on him, for example an option to purchase<sup>15</sup>. Where the identity of the covenantee is clear and unambiguous, the statutory provision does not operate to confer the benefit of the covenant on a party who is not within the ambit of the expressly identified covenantee<sup>16</sup>. Moreover it only allows a person to sue on a covenant, where not named as a party to it, if the covenant purported to be made with him; it is not enough merely to show that the covenant is made for his benefit<sup>17</sup>.

The benefit of a covenant implied on a disposition of property<sup>18</sup> is annexed and incident to, and goes with, the estate or interest of the person to whom the disposition is made, and is capable of being enforced by every person in whom that estate or interest is (in whole or in part) for the time being vested<sup>19</sup>.

These rules have been significantly relaxed in respect of covenants made after May 2000<sup>20</sup>. Subject to the expression of a contrary intention, a person may sue on a contract to which he is not a party, if the contract purports to confer a benefit on him<sup>21</sup>. Provided that the third party is a member of an identifiable class, such as future owners of adjacent land, he need not be in existence at the time when the covenant was made<sup>22</sup>.

1 *Scudamore v Vanderstene* (1587) 2 Co Inst 673; *Green v Horne* (1694) 1 Salk 197; *Lowther v Kelly* (1723) 8 Mod Rep 115 at 118. It is not necessary that he should be designated by name: *Sunderland Marine Insurance Co v Kearney* (1851) 16 QB 925 at 938. As to deeds poll see PARA 3 ante.

2 *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328.

3 *Chelsea and Waltham Green Building Society v Armstrong* [1951] Ch 853 at 856, [1951] 2 All ER 250 at 253 per Vaisey J (in this case the plaintiffs were held entitled to enforce a covenant, purporting to have been made with them, contained in a registered transfer of land under seal to which they were not parties). See also 2 Co Inst 673; *Cooker v Child* (1673) 2 Lev 74. As to indentures see PARA 3 ante.

4 Co Litt 231a. Formerly this rule applied to a legal remainder, but now there cannot be a legal estate in remainder, and the corresponding interest is an equitable interest in remainder: see the Law of Property Act 1925 s 1(1), (3); and PARA 10 note 8 ante.

5 2 Preston on Conveyancing (3rd Edn) 394.

6 *Moyle v Ewer* (1602) Cro Eliz 905; Shep Touch 217; Co Litt 52b, n (4); *Lowther v Kelly* (1723) 8 Mod Rep 115, 118; *Storer v Gordon* (1814) 3 M & S 308 at 322-323; 2 Preston on Conveyancing (3rd Edn) 400.

7 Co Litt 231a; 2 Co Inst 673; *Windsore v Hobart* (1585) Hob 313; *Greenwood v Tyler* (1620) Hob 314; *Storer v Gordon* (1814) 3 M & S 308 at 322-323; *Metcalfe v Rycroft* (1817) 6 M & S 75; 2 Preston on Conveyancing (3rd Edn) 394 et seq; *Berkeley v Hardy* (1826) 5 B & C 355; *Lord Southampton v Brown* (1827) 6 B & C 718; *Gardner v Lachlan* (1836) 8 Sim 123 at 126 (affd without reference to this point (1838) 4 My & Cr 129); *Beckham v Drake* (1841) 9 M & W 79 at 95 (on appeal on another point (1849) 2 HL Cas 579); *Chesterfield and Midland Silkstone Colliery Co Ltd v Hawkins* (1865) 3 H & C 677 at 692.

8 *Harmer v Armstrong* [1934] Ch 65 at 86, CA, per Lawrence LJ. For examples of the application of the general rule see *Re Sinclair's Life Policy* [1938] Ch 799, [1938] 3 All ER 124; *Re Foster, Hudson v Foster* [1938] 3 All ER 357; *White v Bijou Mansions Ltd* [1938] Ch 351, [1938] 1 All ER 546, CA.

9 Law of Property Act 1925 s 56(1) (replacing the first part of the Real Property Act 1845 s 5 (repealed)). It is, however, not confined to indentures, but applies to any instrument by which a benefit can be conferred. It has been construed as not extending to personal property (other than chattels real): *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. See also *Re Selwyn's Conveyance*, *Hayman v Soole* [1967] Ch 674, [1967] 1 All ER 339. As to execution under a power of attorney see the Powers of Attorney Act 1971 s 7 (as amended); and AGENCY vol 1 (2008) PARA 45. As to the rights and liabilities in general of strangers to a contract see CONTRACT vol 9(1) (Reissue) PARA 748 et seq. As to the assignment of rights under a contract see CONTRACT vol 9(1) (Reissue) PARA 754-758. As to the effect of the creation of a trust see TRUSTS vol 48 (2007 Reissue) PARAS 601-753.

10 *Kelsey v Dodd* (1881) 52 LJ Ch 34 at 39; *Dyson v Forster* [1909] AC 98, HL; *Westhoughton UDC v Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159, CA.

11 Ie the Law of Property Act 1925 s 56(1): see the text and note 9 supra.

12 In *Forster v Elvet Colliery Co Ltd* [1908] 1 KB 629, CA, the Court of Appeal held that they are so confined, but doubt was expressed as to this in the House of Lords (reported sub nom *Dyson v Forster* [1909] AC 98 at 102, HL). The decision of the Court of Appeal in that case was, however, treated as binding on the point in *Grant v Edmondson* [1931] 1 Ch 1, CA, although criticised at 28 per Romer LJ. See also *Re Ecclesiastical Comrs for England's Conveyance* [1936] Ch 430 at 437-438 per Luxmoore J; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 273-274, [1953] 2 All ER 1475 at 1483, CA, per Denning LJ.

13 *White v Bijou Mansions Ltd* [1938] Ch 351 at 365, [1938] 1 All ER 546 at 554, CA, per Greene MR; *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 WLR 1025.

14 *White v Bijou Mansions Ltd* [1937] 3 All ER 269 at 276-277 per Simonds J (affd [1938] Ch 351, [1938] 1 All ER 546, CA); *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 WLR 1025.

15 *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59.

16 *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 WLR 1025 (doubting dicta in *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 272, [1953] 2 All ER 1475 at 1483, CA, per Denning LJ, in the light of *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL).

17 *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990, [1997] 1 WLR 1025.

18 Ie by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see s 7.

19 Ibid s 7 (replacing provisions previously contained in the Law of Property Act 1925 s 76(6) (repealed) in relation to covenants implied by s 76 (repealed)). As to covenants in leases see the Landlord and Tenant (Covenants) Act 1995; and LANDLORD AND TENANT.

20 The date when the Contracts (Rights of Third Parties) Act 1999 came into force: see s 10(2). As to the Contracts (Rights of Third Parties) Act 1999 generally see CONTRACT.

21 See *ibid* s 1(1).

22 See *ibid* s 1(3).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(4) EFFECT OF A DEED/62. Effect of non-execution by party.

## 62. Effect of non-execution by party.

When a deed is expressed to be made between several parties or a deed poll to be made by more persons than one<sup>1</sup>, and some or one only of those parties or persons execute the same, it is not the deed of any person who has not executed it<sup>2</sup>. Unless, however, it was delivered as an escrow to take effect only in case of and upon its execution by all or some other of the parties<sup>3</sup>, or unless an equity arises, it is the deed of every person who has executed it, and, owing to his being estopped from averring anything in contradiction thereof<sup>4</sup>, it takes effect, as against him, according to its purport from the time of his execution of it, notwithstanding that the other party or parties have neither executed it nor expressed assent to its provisions<sup>5</sup>.

For example, an equity arises where a deed, executed on the assumption that another person then absent will execute it too<sup>6</sup>, is sought to be enforced against an executing party and, owing to the non-execution by the absentee, the obligation which is sought to be enforced is substantially different from what it would have been if the absentee had in fact executed the deed<sup>7</sup>. In such a case the deed is not binding on the person who has executed it until the absentee has joined in its execution<sup>8</sup>. This is so notwithstanding that the absentee is not named as a party to the deed if he is so referred to in it as to make it plain that the deed was executed on the supposition that he would ultimately concur in the intended arrangement<sup>9</sup>. Further, where one party enters into a deed with another on the basis, which was known to and understood by both of them, that a third party was also to sign and the third party does not do so, the deed does not bind the parties<sup>10</sup>.

1 See PARA 3 ante.

2 Littleton's Tenures s 373; Bro Abr, Dette (38, 80), Obligation (13, 14, 27). As to his ability to enforce covenants in his favour therein contained see PARA 61 ante.

3 See PARAS 37-39 ante. See also *Underhill v Horwood* (1804) 10 Ves 209 at 226; *Latch v Wedlake* (1840) 11 Ad & El 959 at 965-966; *Bonser v Cox* (1841) 4 Beav 379 at 383; *Evans v Bremridge* (1856) 8 De GM & G 100; *Beckett v Addyman* (1882) 9 QBD 783 at 788-789, CA, per Field J; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; and cf *Cooper v Evans* (1867) LR 4 Eq 45.

4 See PARA 57 ante.

5 *Foster v Mapes* (1591) Cro Eliz 212; Co Litt 229a; *Exton v Scott* (1833) 6 Sim 31; *Cooch v Goodman* (1842) 2 QB 580 at 600; *Fletcher v Fletcher* (1844) 4 Hare 67; *Morgan v Pike* (1854) 14 CB 473 at 484; *Re Way's Trusts* (1864) 2 De GJ & Sm 365; *Xenos v Wickham* (1866) LR 2 HL 296; *Whitmore-Searle v Whitmore-Searle* [1907] 2 Ch 332; *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, [1951] 2 All ER 250; and see PARA 63 note 1 post. See also *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 All ER 934, [2006] 1 WLR 1847.

6 A deed of family arrangement come to by persons who have signed the deed without the knowledge or in the absence of one member of the family intended to be affected by it is regarded, in the absence of any provision to the contrary express or implied, as having been entered into on the assumption that absent members of the family affected by it will in the due time join in the transaction: *Re Morton, Morton v Morton* [1932] 1 Ch 505 at 507-508 per Eve J. See further SETTLEMENTS vol 42 (Reissue) PARA 1009.

7 *Lady Naas v Westminster Bank Ltd* [1940] AC 366 at 391, [1940] 1 All ER 485 at 500, HL, per Lord Russell of Killowen, and at 404-406 and 509-510 per Lord Wright.

8 *Peto v Peto* (1849) 16 Sim 590; *Bolitho v Hillyar* (1865) 34 Beav 180; *Re Morton, Morton v Morton* [1932] 1 Ch 505.

9 *Re Morton, Morton v Morton* [1932] 1 Ch 505 at 508 per Eve J.



10     *Woollam v Barclays Bank plc* [1988] EGCS 22.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(4) EFFECT OF A DEED/63. Effect of disclaimer.

### 63. Effect of disclaimer.

If the other party or parties to a deed are under no obligation, independently of the deed, to execute it or abide by its provisions, the deed is liable to be avoided by his or their disclaimer of the benefit of it<sup>1</sup>. Thus a deed of grant or other assurance of property takes effect immediately upon its execution by the grantor or assurator, and then at once passes the property expressed to be assured to the grantee or alienee, although the latter has not executed or assented to the deed, subject, however, to the property revesting in the alienor in case the benefit of the assurance is disclaimed<sup>2</sup>. Further, an obligation or duty undertaken by deed is immediately binding on the person on whom it is incumbent from the moment of his execution of the deed, and before the person who is to take the benefit of the liability so assumed has expressed his assent to the transaction<sup>3</sup> although the latter may subsequently disclaim the benefit of the obligation<sup>4</sup>.

1 YB 7 Edw 4, 20 (pl 21), 29 (pl 14); Littleton's Tenures ss 684-685; *Butler and Baker's Case* (1591) 3 Co Rep 25a at 26b, 27a, Ex Ch; *Whelpdale's Case* (1604) 5 Co Rep 119a at 119b; Shep Touch 70, 284-285; *Thompson v Leach* (1690) 2 Vent 198 at 202, 208; *Wankford v Wankford* (1699) 1 Salk 299 at 307 per Holt CJ; *Siggers v Evans* (1855) 5 E & B 367 at 380 et seq; *Peacock v Eastland* (1870) LR 10 Eq 17; *Re Deveze, ex p Cote* (1873) 9 Ch App 27 at 32; *Standing v Bowring* (1885) 31 ChD 282 at 286, 288, 290, CA; *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436 at 439, CA; *Mallott v Wilson* [1903] 2 Ch 494 at 500-502. As to disclaimer see PARAS 74-75 post.

2 See note 1 supra.

3 *Butler and Baker's Case* (1591) 3 Co Rep 25a at 26b, 27a, Ex Ch; and see *Hall v Palmer* (1844) 3 Hare 532; *Xenos v Wickham* (1866) LR 2 HL 296.

4 *Wetherell v Langston* (1847) 1 Exch 634, Ex Ch; and see note 1 supra.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(4) EFFECT OF A DEED/64. Accepting benefit without execution.

#### **64. Accepting benefit without execution.**

Where a person named in some deed, whether as a party to it or not, has, without executing the deed, accepted some benefit thereby assured to him, he is obliged to give effect to all the conditions on which the benefit was therein expressed to be conferred; and he must, therefore, perform or observe all covenants or stipulations on his part which are contained in the deed, and on the performance or observance of which the benefit conferred was meant to be conditional<sup>1</sup>. For example, a mortgagee who has made a loan on mortgage, but has not executed the mortgage deed (which has been executed by the mortgagor only), is bound to give effect to a proviso contained in the deed for reduction of the rate of interest on punctual payment, or for allowing the loan to remain on the mortgage for a certain term<sup>2</sup>. If a person enters into land under an assurance made to him by deed (which he has not executed) for a term of years, for his life or in tail, and it subsequently appears that the grantor who made the assurance had no rightful title to the land, the person who has so entered is estopped from asserting, against the remainderman under the deed, a possessory title to the land as derived from his own wrongful entry and the effect of the Limitation Act 1980<sup>3</sup>, even though he may be able to set up such a title against the original rightful owner<sup>4</sup>. Where a company takes the benefit of an apprenticeship agreement which it has not executed, it will be taken to have adopted it and will be bound by it<sup>5</sup>.

1 YB 38 Edw 3, 8a; YB 45 Edw 3, 11, (pl 7); YB 8 Edw 4, 8b; Littleton's Tenures s 374; Bro Abr, Dette (38, 80), Obligation (13, 14, 27); 1 Dyer 13b, pl 65; Co Litt 230b and n (1); *Brett v Cumberland* (1619) 2 Roll Rep 63; *R v Houghton-le-Spring* (1819) 2 B & Ald 375; *Webb v Spicer* (1849) 13 QB 886 at 893 (on appeal sub nom *Salmon v Webb and Franklin* (1852) 3 HL Cas 510); *Linwood v Squire* (1850) 5 Exch 234 at 236; *Macdonald v Law Union Insurance Co* (1874) LR 9 QB 328 at 330 and 332; *Aspden v Seddon* (1876) 1 Ex D 496 at 503, CA; *Westhoughton UDC v Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159 at 174, CA; *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371. Before 1926, a grantee of land, subject to the reservation of an easement thereover, was bound, if he accepted the grant, to give effect to the reservation, though he did not execute the conveyance (*May v Belleville* [1905] 2 Ch 605); but now the reservation operates to create the legal estate reserved without execution of the conveyance by the grantee (see the Law of Property Act 1925 s 65(1); and PARA 239 post).

2 See note 1 supra; and *Morgan v Pike* (1854) 14 CB 473 at 483-486.

3 See the Limitation Act 1980 ss 15, 17 (as amended), Sch 1 (as amended); and LIMITATION PERIODS.

4 *Dalton v Fitzgerald* [1897] 2 Ch 86, CA; cf the Limitation Act 1980 Sch 1 (as amended) (see LIMITATION PERIODS); and see Littleton's Tenures s 374.

5 *McDonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/1. DEEDS/(4) EFFECT OF A DEED/65. Concealment of fact of execution.

## **65. Concealment of fact of execution.**

If a deed is duly executed and delivered as such<sup>1</sup>, it will take effect according to its purport, notwithstanding that the fact of its execution is concealed from or unknown to the persons or some person intended to benefit under it<sup>2</sup>, unless it is avoided, on coming to their or his knowledge, by disclaimer of the benefit of it<sup>3</sup>.

1 See PARAS 1, 37, 60 ante.

2 *Thompson v Leach* (1690) 2 Vent 198; *Barlow v Heneage* (1702) Prec Ch 210; *Clavering v Clavering* (1704) 2 Vern 473 (affd (1705) 7 Bro Parl Cas 410, HL); *Cecil v Butcher* (1821) 2 Jac & W 565; *Doe d Garnons v Knight* (1826) 5 B & C 671; *Exton v Scott* (1833) 6 Sim 31; *Grugeon v Gerrard* (1840) 4 Y & C Ex 119; *Hall v Palmer* (1844) 3 Hare 532; *Fletcher v Fletcher* (1844) 4 Hare 67; *Siggers v Evans* (1855) 5 E & B 367; *Re Way's Trusts* (1864) 2 De GJ & Sm 365; *Jones v Jones* (1874) 31 LT 535; *Standing v Bowring* (1885) 31 ChD 282, CA; *Sharp v Jackson* [1899] AC 419, HL; *Re McCallum, McCallum v McCallum* [1901] 1 Ch 143, CA; *Mallott v Wilson* [1903] 2 Ch 494. As to loss of documents see further EQUITY vol 16(2) (Reissue) PARAS 446-447; and see also *East India Co v Boddam* (1804) 9 Ves 464.

3 See PARA 63 ante.

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## 66. Execution by non-party.

It appears that by executing a deed a person may incur any liability expressed in it to be undertaken by him, notwithstanding that he is not named as a party to the deed<sup>1</sup>; but, except as previously mentioned<sup>2</sup>, a person cannot sue at common law upon any covenant contained in a deed inter partes, even though the covenant is expressed or appears to be made for his benefit, if he is not named as a party to the deed<sup>3</sup>; although at equity he may enforce the covenant provided its provisions are such as to constitute him a beneficiary of a trust of the benefit of the covenant<sup>4</sup>. If, however, a person is named as a party to a deed inter partes, he may sue upon any covenant made with him and contained in the deed without having executed it<sup>5</sup>, unless the transaction carried out thereby was such that his own execution of the deed was a condition precedent to his enforcement of the covenant<sup>6</sup>. Thus, if by a lease by deed a house is expressed to be demised for a term exceeding three years<sup>7</sup>, and the lessee covenants with the lessor to repair the house during the term, and the lessee executes the counterpart but the lessor does not execute the lease, the lessor cannot sue the lessee upon the covenant to repair without first executing the lease, notwithstanding that the lessee has entered into possession of the house; for it is a condition precedent to the lessee's liability to repair that he has a valid demise of the house for the term agreed upon<sup>8</sup>.

1 *Salter v Kidley* (1688) 1 Show 58; 2 Preston on Conveyancing (3rd Edn) 418.

2 See PARA 61 ante.

3 *Dyson v Forster* [1909] AC 98, HL; and see PARA 61 note 12 ante.

4 *Hook v Kinnear* (circa 1750) 3 Swan 417n; *Gregory v Williams* (1817) 3 Mer 582 at 590; *Page v Cox* (1852) 10 Hare 163; *Touche v Metropolitan Rly Warehousing Co* (1871) 6 Ch App 671 at 677; *Re Empress Engineering Co* (1880) 16 ChD 125 at 129, CA; *Lloyd's v Harper* (1880) 16 ChD 290 at 315, 317, CA; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA; *Gandy v Gandy* (1885) 30 ChD 57 at 67, 69-70, 73-74, CA.

5 *Clement v Henley* (1643) 2 Roll Abr 22 (F 2); *Rose v Poulton* (1831) 2 B & Ad 822 at 830; *Wetherell v Langston* (1847) 1 Exch 634 at 643; *Pitman v Woodbury* (1848) 3 Exch 4; *British Empire Assurance Co v Browne* (1852) 12 CB 723; *Morgan v Pike* (1854) 14 CB 473. See also PARAS 61-62, 64 ante.

6 See 1 Wms Saund 320 n (4); 2 Wms Saund 352 n (3); *Linwood v Squire* (1850) 5 Exch 234 at 236; *Wilkinson v Anglo-Californian Gold Mining Co* (1852) 18 QB 728.

7 See PARAS 14, 15 note 6 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 102.

8 *Soprani and Barnardi v Skurro* (1602) Yelv 18; *Pitman v Woodbury* (1848) 3 Exch 4; *Wheatley v Boyd* (1851) 7 Exch 20 at 21; *Swatman v Ambler* (1852) 8 Exch 72; *Toler v Slater* (1867) LR 3 QB 42 at 45.

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## **(5) AVOIDANCE, DISCHARGE, ALTERATION AND RECTIFICATION OF DEEDS**

### **(i) Avoidance in general**

#### **67. Grounds for avoiding a deed.**

Apart from the absence of valuable consideration a person is not precluded by the fact that his act in pais<sup>1</sup> is evidenced by deed from averring any ground of avoidance of that act which he might have asserted if the act had been accomplished by word of mouth or an instrument under hand only. Thus any party to a deed may aver and prove by extrinsic evidence that he has not given such true, full, and free consent to the transaction expressed therein as will render it unimpeachable, or that the deed cannot take effect as expressed by reason of some legal incapacity affecting him, or that on account of some rule of law or equity the deed ought not to bind him according to its purport<sup>2</sup>.

1 Acts in pais (ie acts out of court, or literally and anciently 'in the country') are opposed to acts in a court of record, and include deeds: see *Beverley's Case* (1603) 4 Co Rep 123b at 124a.

2 See PARA 68 post.

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## **68. Examples of grounds for avoidance.**

A party to a deed is not estopped from proving that it is void because he was induced by the machinations of some other person to execute it under a mistake of a fundamental nature (not due to his own carelessness) as to the substance of the transaction expressed to be effected thereby<sup>1</sup>, or because he and the other parties executed the deed under a mutual mistake of fact<sup>2</sup>. A person may aver, in opposition to his own deed, that he was induced to execute it by fraud<sup>3</sup>, misrepresentation<sup>4</sup>, duress<sup>5</sup>, or undue influence<sup>6</sup>, and prove that for this reason it is voidable.

It may equally well be alleged that a party to a deed was at the time of its execution under the disability of infancy<sup>7</sup>, mental disorder<sup>8</sup> or drunkenness<sup>9</sup>, or, in the case of a corporation, that the act purported to be effected by the deed was at the time ultra vires<sup>10</sup>; and it may be shown that the deed is on that account void or voidable, according to the effect of the particular incapacity pleaded.

Where the object of an agreement made by deed is unlawful, because the act to be performed is illegal<sup>11</sup> or contrary to public policy<sup>12</sup>, the agreement is no more enforceable than if it had been made by parol<sup>13</sup>.

Under certain circumstances a deed may be rectified, or treated as if rectified<sup>14</sup>.

A sale carried out by deed is voidable if it is in effect a sale by a trustee for sale to himself<sup>15</sup>.

Where an individual has been adjudged bankrupt and has at a relevant time<sup>16</sup> entered into a transaction with any person at an undervalue<sup>17</sup>, the trustee of the bankrupt's estate may apply to the court for an order under the Insolvency Act 1986<sup>18</sup>. On such an application, the court may make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction<sup>19</sup>, including an order requiring any property, transferred as apart of the transaction, to be vested in the trustee of the bankrupt's estate as part of that estate<sup>20</sup>. There are similar provisions in relation to transactions defrauding creditors, which are not restricted to transactions taking place within a relevant time<sup>21</sup>.

1 See PARA 69 post.

2 *Colyer v Clay* (1843) 7 Beav 188; *Scott v Coulson* [1903] 1 Ch 453 (affd [1903] 2 Ch 249, CA); and see PARA 70 post. As to mistake generally see MISTAKE.

3 *Edwards v M'Leay* (1815) Coop G 308 (affd with slight variation (1818) 2 Swan 287); *Trevelyan v White* (1839) 1 Beav 588; *Charter v Trevelyan* (1844) 11 Cl & Fin 714, HL; *Stump v Gaby* (1852) 2 De GM & G 623 at 630-631; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1 at 13, 15, CA; *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192 at 197. See EQUITY vol 16(2) (Reissue) PARA 412 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 781-783.

4 See *Carter v Boehm* (1766) 3 Burr 1905; *Hemmings v Sceptre Life Association Ltd* [1905] 1 Ch 365 at 369; *Howatson v Webb* [1908] 1 Ch 1, CA; *Angel v Jay* [1911] 1 KB 666; *Doe d Lloyd v Bennett* (1837) 8 C & P 124. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 714.

5 *Whelpdale's Case* (1604) 5 Co Rep 119a. See also CONTRACT vol 9(1) (Reissue) PARA 710; EQUITY vol 16(2) (Reissue) PARA 436.

6 *Sturge v Sturge* (1849) 12 Beav 229; *Gresley v Mousley* (1859) 4 De G & J 78. See also EQUITY vol 16(2) (Reissue) PARA 416 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq.

7 Littleton's Tenures s 259; Co Litt 171b; *Whelpdale's Case* (1604) 5 Co Rep 119a. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq.

8 *Leach v Thompson* (1698) Show Parl Cas 150, HL; *Yates v Boen* (1738) 2 Stra 1104; *Elliot v Ince* (1857) 7 De GM & G 475; *Re Walker* [1905] 1 Ch 160, CA. See also MENTAL HEALTH vol 30(2) (Reissue) PARAS 608-609.

9 See *Cole v Robins* (1703) Bull NP 172; *Matthews v Baxter* (1873) LR 8 Exch 132; and CONTRACT vol 9(1) (Reissue) PARA 717.

10 *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354, HL; and see COMPANIES vol 15 (2009) PARA 1256 et seq. As to a company's capacity and formalities for carrying on business see PARA 41 note 15 ante; and COMPANIES vol 14 (2009) PARAS 256, 263, 265, 268.

11 *Collins v Blantern* (1767) 2 Wils 341 at 351-352; *Cannan v Bryce* (1819) 3 B & Ald 179 (illegal stock-jobbing transactions); *Gedge v Royal Exchange Assurance Corp'n* [1900] 2 QB 214 (marine policy void for insertion of clause illegal by statute); *Lodge v National Union Investment Co Ltd* [1907] 1 Ch 300 (illegal moneylending).

12 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 189 et seq; *Walker v Perkins* (1764) 1 Wm Bl 517 (bond for cohabitation); *Bennett v Bennett* [1952] 1 KB 249, [1952] 1 All ER 413, CA (covenants purporting to oust jurisdiction of court); and cf *Addison v Brown* [1954] 2 All ER 213, [1954] 1 WLR 779 (covenant purporting to oust jurisdiction of foreign court). However, a deed will be valid if, on the face of it, it is not contrary to public policy; *Rosenburg v Rosenberg* (1954) Times, 16 July. Where a man assigns or charges all his property, the question arises whether such an assignment or charge is unenforceable as being too vague or contrary to public policy in that a man should not be allowed to deprive himself of his livelihood. The question was discussed, but not decided in the following cases: *Re Clarke, Coombe v Carter* (1887) 36 ChD 348, CA (assignment to mortgagee of after-acquired property); *Tailby v Official Receiver* (1888) 13 App Cas 523 at 530-531, HL (bill of sale assigning future book debts); *Re Turcan* (1888) 40 ChD 5, CA (covenant to settle after-acquired property); *Re Kelcey, Tyson v Kelcey* [1899] 2 Ch 530 (general charge on all property); *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC (charge on all income and estate). In each of these cases it was sought to enforce such an assignment, covenant, charge or bill of sale against specific existing property. Since such transactions were divisible (see *Re Clarke, Coombe v Carter* supra; *Re Turcan* supra) this was possible, and to that extent they were unobjectionable, being neither vague nor contrary to public policy.

13 Co Litt 206b; Shep Touch 371-372; Bac Abr, Obligations (E); and see CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

14 *Re Bird's Trusts* (1876) 3 ChD 214. See further PARA 188 post. As to rectification see EQUITY vol 16(2) (Reissue) PARAS 440-443; MISTAKE vol 77 (2010) PARA 57 et seq.

15 *Randall v Errington* (1805) 10 Ves 423; *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167. See also *Holder v Holder* [1968] Ch 353 at 398, [1968] 1 All ER 665 at 677, CA, per Danckwerts LJ; and TRUSTS vol 48 (2007 Reissue) PARA 938 et seq.

16 For the meaning of 'relevant time' see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 660.

17 For the meaning of 'transaction at an undervalue' see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 654.

18 Insolvency Act 1986 s 339(1). As to transactions at an undervalue see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (Reissue) PARAS 653-662; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 867.

19 Ibid s 339(2).

20 Ibid s 342(1)(a).

21 See ibid ss 423-425; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 663-667.



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## (ii) Plea of Non Est Factum

### 69. When plea available.

The plea of non est factum, or nient son fait, is that by which a man sought to be charged in some claim or proceeding upon a deed alleged to have been delivered by him avers that it is not his deed<sup>1</sup>. This plea is only available where the party sued can show either that there never has been, or that there is not existing at the time of the plea, any valid execution of the deed on his part<sup>2</sup>. If a man taking reasonable care has nevertheless been induced by the machinations of some other person (whether a party or a stranger to the deed) to execute a deed under a substantial mistake (not merely as to the legal effect of known contents of the deed) such that he believed it to be fundamentally different in substance or in kind from what it was<sup>3</sup>, so that when he executed it his mind did not accompany his outward act, he may plead that for this reason that the deed is not his deed, and if this plea is established by the evidence, the deed will be altogether void from the beginning<sup>4</sup>. A deed so procured is no more the deed of the person who was thus induced to execute it than is a forged deed<sup>5</sup>.

1 Shep Touch 74. A person cannot avoid liability under a deed by executing it in a name which is not in fact his own name: *Fung Ping Shan v Tong Shun*[1918] AC 403, PC.

2 See *Nichols v Haywood* (1545) 1 Dyer 59a; *Whelpdale's Case* (1604) 5 Co Rep 119a at 119b; and note (c) in Fraser's edition of 1826 (77 English Reports 241); *Pigot's Case* (1614) 11 Co Rep 26b; Co Litt 35b, n (7); Com Dig, Pleader (2, W, 18); Shep Touch 74; *Edwards v Brown* (1831) 1 Cr & J 307; 1 Chitty on Pleading (7th Edn) 510-512.

3 The distinction drawn in *Howatson v Webb*[1907] 1 Ch 537 (affd [1908] 1 Ch 1, CA), and subsequent cases, between the character and contents of the documents was rejected as unsatisfactory in *Saunders v Anglia Building Society*[1971] AC 1004, [1970] 3 All ER 961, HL. A fundamental difference between the deed as it is and as it was believed to be may lie: (1) in the kind of transaction given effect to, as where a conveyance on sale is executed in the belief that it is a contract of guarantee; (2) in the property dealt with, as where a conveyance of Blackacre is made under the impression that the assurance is of Whiteacre; (3) in the person in whose favour the deed is made, as where property is conveyed to John in the belief that it is being assured to William; or (4) in any other particular which goes to the substance of the whole consideration or to the root of the matter. The case of *Howatson v Webb* supra is opposed to this last conclusion, and, if read literally, would appear to exclude all kinds of difference other than as head (1) supra, but was in this respect considered and explained or disapproved by the House of Lords in *Saunders v Anglia Building Society* supra at 1017-1018 and 964-965 per Lord Hodson, at 1022 and 968-969 per Viscount Dilhorne, at 1025 and 971 per Lord Wilberforce, and at 1039 and 982-983 per Lord Pearson.

As to head (1) supra see *Thoroughgood's Case* (1584) 2 Co Rep 9a; *Foster v Mackinnon*(1869) LR 4 CP 704; *Bagot v Chapman*[1907] 2 Ch 222.

As to head (2) supra see *Anon* (1506) Keil 70, pl 6; *Altham's Case* (1610) 8 Co Rep 150b at 155; *Miller v Travers* (1832) 8 Bing 244 at 248; *Doe d Gord v Needs* (1836) 2 M & W 129 at 140; *Raffles v Wichelhaus* (1864) 2 H & C 906; *Van Praagh v Everidge*[1902] 2 Ch 266 (revsd, on a point concerning the Statute of Frauds (1677), [1903] 1 Ch 434, CA), where Kekewich J held the defendant to be estopped from averring his error.

As to head (3) supra see *Boulton v Jones* (1857) 2 H & N 564; *Hardman v Booth* (1863) 1 H & C 803; *Hollins v Fowler*(1875) LR 7 HL 757 at 762-763, 794-795; *Cundy v Lindsay*(1878) 3 App Cas 459, HL; *Re Cooper, Cooper v Vesey*(1882) 20 ChD 611, CA; *Said v Butt*[1920] 3 KB 497; *Saunders v Anglia Building Society* supra at 1019 and 965, where Lord Hodson pointed out that error of personality was not necessarily so vital in deeds as in contracts.

As to head (4) supra see YB 30 Edw 3, 31b; YB 47 Edw 3, 3b, pl 5; YB 9 Hen 6, 59, pl 8; 2 Roll Abr, Fairs (S), pl 6-8; Com Dig, Fait (B2); *Simons v Great Western Rly Co* (1857) 2 CBNS 620 at 624 per Willes J; *Kennedy v Panama etc Mail Co*(1867) LR 2 QB 580 at 587-588; *Smith v Hughes*(1871) LR 6 QB 597; *Stewart v Kennedy (No 2)*

(1890) 15 App Cas 108, HL; *Saunders v Anglia Building Society* supra at 1019 and 965 per Lord Hodson, at 1017 and 964 per Lord Reid, at 1018 and 965 per Lord Hodson, at 1022 and 968-969 per Viscount Dilhorne, at 1025 and 971 per Lord Wilberforce, and at 1039 and 982-983 per Lord Pearson, explaining *Howatson v Webb* supra at 544-545 per Warrington J (seemingly approved [1908] 1 Ch 1, CA) (where the defendant was a solicitor's managing clerk and could not have been misled if he had read the deed, but chose to execute it without reading it). See also *Bell v Lever Bros Ltd* [1932] AC 161, HL.

As to mistake generally see MISTAKE.

4 *Anon* (1506) Keil 70, pl 6; *Thoroughgood's Case* (1584) 2 Co Rep 9a; *Maunxel's Case* (1583) Moore KB 182 at 184; *Pigot's Case* (1614) 11 Co Rep 26b at 27b, 28a; *Shulter's Case* (1611) 12 Co Rep 90; Shep Touch 56; *Foster v Mackinnon* (1869) LR 4 CP 704; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1 at 10, CA, per Cotton LJ; *Lewis v Clay* (1897) 67 LQB 224; *Bagot v Chapman* [1907] 2 Ch 222 at 227; and see *Howatson v Webb* [1907] 1 Ch 537 (affd [1908] 1 Ch 1, CA); *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233 at 234-235, CA; *Taylor v Taylor and Barclay's Bank Ltd* (1933) 77 Sol Jo 319; *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL. See also PARA 57 ante; and CONTRACT vol 9(1) (Reissue) PARA 687.

5 See *Foster v Mackinnon* (1869) LR 4 CP 704.

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## **70. Conditions necessary for avoidance through mistake as to contents.**

The plea of non est factum on the ground of mistake as to contents appears originally to have been allowed in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were executing<sup>1</sup>. It is also now allowed to those who are permanently or temporarily unable, through no fault of their own, to have any real understanding, without explanation, of the purport of the particular document, whether their inability arises from defective education, illness or innate incapacity<sup>2</sup>. A person raising the plea must have taken such precautions as he reasonably could<sup>3</sup>, and must prove that he took reasonable care as well as proving all the other circumstances necessary to found the relief<sup>4</sup>. Normally, a blind or illiterate person must have had the deed read over or fully explained to him before execution<sup>5</sup>, and a person of full capacity can only establish the plea in very exceptional circumstances<sup>6</sup>, certainly not where his reason for not scrutinising the document before executing it was that he was too busy or too lazy to do so<sup>7</sup>, and his reliance on someone whom he trusted will not usually be regarded as a sufficient reason<sup>8</sup>. Where a person was led to believe that the document was not one affecting his legal rights, there may be cases where the plea can properly be applied in favour of a man of full capacity<sup>9</sup>, though it seems that the plea will not be available to anyone who was content to execute the document without taking the trouble either to find out at least its general effect by reading it or to inquire as to its general effect<sup>10</sup>.

The mistake must have been induced by a misrepresentation made, whether by words or conduct, by some person other than the executing party raising the plea; the other person need not be a party himself, but a self-induced mistake is insufficient<sup>11</sup>.

The plea is not available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser<sup>12</sup>.

The degree to which the document must be different from that which it was believed to be has been expressed in a variety of ways, all involving fundamental or at least very substantial difference<sup>13</sup>, but the requirement of difference in character has been discarded<sup>14</sup> and the difference may therefore now be in the kind of document or in its substance<sup>15</sup>.

In some cases where non est factum cannot be successfully pleaded, a deed whose execution was induced by a misrepresentation may be set aside under the equitable remedies of rescission and cancellation or may be corrected under the equitable remedy of rectification<sup>16</sup>. Conversely, owing in particular to equitable defences, none of these remedies may be available and yet the requirements for establishing non est factum may all be present; it is no answer to this plea that the claimant against whom the plea is raised has acquired property in good faith for value without notice under the deed sought to be treated as a nullity, whereas the equitable remedies are not given to the detriment of such a purchaser. The remedy of rectification will also lie in some cases where a mistake has been made in preparing a deed so that it fails to carry out the intentions of the maker or makers of the deed<sup>17</sup>.

These principles apply equally to a person who signs a document in blank<sup>18</sup>.

1 *Saunders v Anglia Building Society* [1971] AC 1004 at 1015-1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, and at 1019-1020 and 966 per Lord Hodson. As to mistake generally see MISTAKE.

2 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1023 and 969 per Viscount Dilhorne, at 1025 and 971 per Lord Wilberforce, and at 1034 and 979 per Lord Pearson.

3 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1023 and 969 per Viscount Dilhorne, at 1027 and 973 per Lord Wilberforce, and at 1034, 1037-1038 and 979, 981-982 per Lord Pearson (overruling *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA).

4 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1027 and 973 per Lord Wilberforce, and at 1038 and 982 per Lord Pearson.

5 *Thoroughgood's Case* (1584) 2 Co Rep 9a; *Maunxel's Case* (1583) Moore KB 182 at 184; and see *Saunders v Anglia Building Society* [1971] AC 1004 at 1027, [1970] 3 All ER 691 at 972, HL, per Lord Wilberforce.

6 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 965 per Lord Hodson, at 1027 and 973 per Lord Wilberforce, and at 1033-1035 and 978-980 per Lord Pearson. See also *Anon* (1684) Skin 159, pl 6; *Duchess of Albemarle v Earl of Bath* (1693) Freem Ch 193 at 194; *Shep Touch* 56; *Hunter v Walters* (1871) 7 Ch App 75 at 87 per Mellish LJ; *Howatson v Webb* [1907] 1 Ch 537 (affd [1908] 1 Ch 1 at 4, CA, per Farwell LJ); *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233 at 234-235, CA; *Alliance Credit Bank of London v Owen* (1908) Times, 27 May; *Re Leighton's Conveyance* [1936] 1 All ER 667 (on appeal on another point [1937] Ch 149, [1936] 3 All ER 1033, CA); *Muskham Finance Ltd v Howard* [1963] 1 QB 904 at 912, [1963] 1 All ER 81 at 83-84, CA, per Donovan LJ. In view of these authorities, it seems that the fact that execution was induced by a false representation, fraudulently made, as to the contents of the deed will not, unaided by other circumstances, suffice to excuse a failure by a person of full capacity to read the deed and inform himself of its purport and effect unless perhaps it was not apparent on the face of the deed that it was intended to have legal consequences: see the text and note 9 *infra*. It has, however, been questioned whether a person can be permitted to rely on an estoppel by deed in his own favour when the party against whom the estoppel is being set up was induced to make the representations relied on by the fraud of a third party acting, or pretending to act, on behalf of the person setting up the estoppel as well as on his own behalf, even though the person setting up the estoppel was wholly innocent of any complicity in the fraud: *Balkis Consolidated Co v Tomkinson* [1893] AC 396 at 410-411, HL, per Lord Macnaghten, quoted by Lord Davey in *Ruben v Great Fingall Consolidated* [1906] AC 439 at 446, HL; and cf *Sheffield Corp'n v Barclay* [1905] AC 392, HL. See also *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, [1984] CCLR 27, CA.

7 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1023 and 969 per Viscount Dilhorne, at 1025-1026 and 971-972 per Lord Wilberforce, and at 1036 and 980-981 per Lord Pearson.

8 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1023 and 969 per Viscount Dilhorne, and at 1032-1033, 1036 and 977-978, 980-981 per Lord Pearson.

9 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1020 and 966 per Lord Hodson, at 1021, 1023 and 967, 969 per Viscount Dilhorne, at 1027 and 973 per Lord Wilberforce, and at 1034-1035 and 979 per Lord Pearson; *Lewis v Clay* (1897) 67 LQB 224.

10 The essence of the plea is that the person executing believed that the deed had one character or effect whereas its actual character or effect was quite different, and he can have no such belief unless he has taken steps or been given information establishing a belief. The very busy man of business who signs a pile of documents without reading them and without inquiry as to their general effect, relying entirely on a trusted secretary, is disabled from raising the plea on the ground that he intended to sign the documents placed before him whatever they might be, his mind accompanying his outward act: *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid, at 1019 and 966 per Lord Hodson, at 1023 and 969 per Viscount Dilhorne, at 1026 and 972 per Lord Wilberforce, and at 1036 and 980-981 per Lord Pearson. Similarly if a man executes and delivers at his solicitor's instance some writing which he knows to be a document in some way affecting his property or his legal position or relations, and has such confidence in his solicitor that he is willing to execute it without having it explained to him, he is precluded from averring that it is not his deed: *Hunter v Walters* (1871) 7 Ch App 75 at 88 per Mellish LJ; *King v Smith* [1900] 2 Ch 425 at 430. A person who looks through an agreement and signs it, although he says he does not understand it, cannot avoid liability on a plea of non est factum because it does not carry out a prior verbal agreement: *Blay v Pollard and Morris* [1930] 1 KB 628, CA.

11 See *Tamplin v James* (1880) 15 ChD 215, CA; *Van Praagh v Everidge* [1902] 2 Ch 266 (revsd on other grounds [1903] 1 Ch 434, CA); *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, [1964] 3 All ER 592, CA.

12 *Saunders v Anglia Building Society* [1971] AC 1004 at 1016, [1970] 3 All ER 961 at 963, HL, per Lord Reid; and see *Powell v Smith* (1872) LR 14 Eq 85; *Tamplin v James* (1880) 15 ChD 215, CA; *Stewart v Kennedy (No 2)* (1890) 15 App Cas 108, HL.

13 See the various alternative tests propounded in *Saunders v Anglia Building Society* [1971] AC 1004 at 1017, [1970] 3 All ER 961 at 964, HL, per Lord Reid ('radical', 'fundamental', 'serious', 'very substantial'), at 1019 and 965 per Lord Hodson ('in a particular which goes to the substance of the whole consideration or to the root of the matter'), at 1022 and 969 per Viscount Dilhorne ('entirely', 'fundamentally'), at 1026 and 972 per Lord Wilberforce ('essentially', 'basically', 'radically', 'fundamentally'), and at 1039 and 983 per Lord Pearson ('fundamentally', 'radically', 'totally').

14 *Saunders v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL, explaining *Howatson v Webb* [1907] 1 Ch 537 (affd [1908] 1 Ch 1, CA). Cases before *Saunders v Anglia Building Society* supra must now be read with caution.

15 *Saunders v Anglia Building Society* [1971] AC 1004 at 1017, [1970] 3 All ER 961 at 964, HL, per Lord Reid, at 1018 and 965 per Lord Hodson, at 1022 and 969 per Viscount Dilhorne, at 1026 and 972 per Lord Wilberforce, and at 1039 and 983 per Lord Pearson.

16 See *Lee v Angas* (1866) 7 Ch App 79n; the text to note 17 infra; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

17 See *Re Bird's Trusts* (1876) 3 ChD 214; and EQUITY vol 16(2) (Reissue) PARA 640; MISTAKE vol 77 (2010) PARA 57 et seq.

18 *United Dominions Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA.

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## 71. Deed executed under common mistake.

Where a deed gives effect to or embodies an agreement entered into under a mistake common to both parties as to some material fact relating to the subject matter of the agreement and not merely to its quality<sup>1</sup>, for example a contract made in the belief that some person is living, who is in fact dead, or that some property is in existence, which is not, the agreement is altogether void<sup>2</sup> and not merely voidable<sup>3</sup>. It follows that the deed is void and not voidable; and it appears upon principle that, if either party should be sued in a claim founded on some obligation undertaken by the deed, he might plead non est factum<sup>4</sup>.

Where there is a mistake, but not of this character, the deed may be rectified, in certain circumstances, under the equitable jurisdiction to correct mistakes<sup>5</sup>.

1 *Kennedy v Panama etc Mail Co* (1867) LR 2 QB 580 at 588 per Blackburn J, quoted by Lord Thankerton in *Bell v Lever Bros Ltd* [1932] AC 161 at 235, HL. Although both parties are under a fundamental mistake as to the nature of the subject matter, the contract will not be a nullity if the parties were to all outward appearances in full agreement: *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 at 459-460, [1953] 2 All ER 739 at 746-747, CA, per Denning LJ. When goods are sold under a known trade description without misrepresentation or breach of warranty, the fact that both parties are unaware that the goods lack any particular quality will not nullify the contract: *Harrison and Jones Ltd v Bunten and Lancaster Ltd* [1953] 1 QB 646 at 658, [1953] 1 All ER 903 at 909 per Pilcher J. As to mistake generally see MISTAKE.

2 If the agreement has no legal effect. For the meaning of 'void' in relation to contracts see CONTRACT vol 9(1) (Reissue) PARA 607.

3 *Hitchcock v Giddings* (1817) 4 Price 135 at 141; *Strickland v Turner* (1852) 7 Exch 208; *Couturier v Hastie* (1856) 5 HL Cas 673; *Cochrane v Willis* (1865) 1 Ch App 58; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 276, 281-282, 284, CA; *Scott v Coulson* [1903] 2 Ch 249 at 252, CA. For this purpose, a common mistake of the parties as to some matter of private right (for instance, as to their respective interests in some land or goods) is a mistake of fact and not of law: *Bingham v Bingham* (1748) 1 Ves Sen 126; *Broughton v Hutt* (1858) 3 De G & J 501; *Cooper v Phibbs* (1867) LR 2 HL 149; *Jones v Clifford* (1876) 3 ChD 779; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA; *Allcard v Walker* [1896] 2 Ch 369; *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804.

4 See PARA 69 note 2 ante. An agreement entered into under a common mistake of fact appears to be void for the same reason that a contract or conveyance, which one is induced to make under a mistake as to the substance of the transaction, is void (where the party is not estopped from averring his mistake); that is, because there was no true consent of the parties, their minds not accompanying their outward acts: see PARA 69 notes 3-4 ante. It is considered that an agreement made under a common mistake of fact is void at law, and there is no necessity for any party to have recourse to equity or to take any proceedings in order to have the agreement set aside or its nullity established: see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 281, CA, per Lindley LJ; *Scott v Coulson* [1903] 2 Ch 249 at 252, CA, per Vaughan Williams LJ; *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875. It is thought that a deed of conveyance executed under a common mistake of fact is equally void. Thus, if A and B, believing Blackacre to be A's and Whiteacre (which in truth is A's also) to be B's, by deed exchange Blackacre for Whiteacre, A can recover Blackacre from B: see the cases cited in note 3 supra. As to common mistake as to existence of subject matter or its essential element see MISTAKE vol 77 (2010) PARA 19.

5 See PARA 88 post.

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## 72. Forged deeds.

A plea of non est factum may be supported by proving that the deed is a forgery, the signature<sup>1</sup> of the party charged having been counterfeited<sup>2</sup>. A deed, the signature<sup>3</sup> to which is forged, is a nullity<sup>4</sup>; but if a man in whose name a deed is forged admits or represents the deed to be his, or keeps silent after discovery of the forgery, he may be estopped, as against any person who has altered his position on the faith of the admission, representation or silence, from denying the deed to be his<sup>5</sup>.

1 In the case of an instrument delivered before the 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see PARA 7 note 4 ante), this includes a seal: see s 1(11); and PARAS 7, 27, 32 ante. As to other cases in which a seal is still required see PARA 32 ante.

2 See *Re De Leeuw, Jakens v Central Advance and Discount Corp'n Ltd* [1922] 2 Ch 540; and cf para 69 note 2 ante. See also *Saunders v Anglia Building Society* [1971] AC 1004 at 1025, [1970] 3 All ER 961 at 971, HL, per Lord Wilberforce; *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch.

3 See note 1 supra.

4 *Governor & Co of Bank of Ireland v Evans' Charities Trustees* (1855) 5 HL Cas 389; *Boursot v Savage* (1866) LR 2 Eq 134; *Re Cooper, Cooper v Vesey* (1882) 20 ChD 611, CA; *Mayor etc & Co of Merchants Staple of England v Governor & Co of Bank of England* (1887) 21 QBD 160, CA; *Barton v North Staffordshire Rly Co* (1888) 38 ChD 458; *Brocklesby v Temperance Building Society* [1895] AC 173 at 184, HL; *A-G v Odell* [1906] 2 Ch 47, CA. For the application of this principle to documents purporting to be issued on behalf of a corporation aggregate see *Ruben v Great Fingall Consolidated* [1904] 2 KB 712, CA (affd [1906] AC 439, HL); *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, CA; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496; and COMPANIES vol 14 (2009) PARAS 268, 293, 387; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1262. The text to this note was cited as representing the law in *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356, HL.

5 See *Leach v Buchanan* (1802) 4 Esp 226; *Ashpittel v Bryan* (1863) 3 B & S 474 at 492-493 (affd (1864) 5 B & S 723, Ex Ch); *McKenzie v British Linen Co* (1881) 6 App Cas 82 at 99-109, HL; *Bank of England v Cutler* [1908] 2 KB 208, CA; *Greenwood v Martins Bank Ltd* [1933] AC 51, HL; *Fung Kai Sung v Chan Fui Hing* [1951] AC 489, PC; and see also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 854; ESTOPPEL vol 16(2) (Reissue) PARA 1059. If, after a document has been executed, an alteration is made in it by a forger, a different rule applies and the document is null and void only if the alteration goes to the whole or to the essence of the instrument: see *Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd* [1954] 2 QB 459 at 476, sub nom *Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd (VV Handels-Maatschappij J Smits Import-Export, third party)* [1954] 1 All ER 779 at 787 per Devlin J (alteration in bill of lading). As to the effect of alteration of a deed after execution see PARA 76 et seq post. As to forgery by one co-owner see *First National Securities Ltd v Hegerty* [1985] QB 850, [1984] 1 All ER 139, CA; *Mortgage Corp'n Ltd v Shaire* [2001] Ch 743, [2001] 4 All ER 364. See also PARA 240 post.

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### **73. Other cases in which plea available.**

The plea of non est factum is available where the writing on which the party is charged was delivered by him as a mere escrow to take effect in some contingency which has not happened<sup>1</sup>. This plea may also be supported by evidence that the execution of the writing, on which it is sought to charge the party, is at the time of the plea null and void, though it may originally have been valid (as where the writing has been altered in a material part since its execution<sup>2</sup>, or has been cancelled by tearing off the seal in the case of an instrument delivered before 31 July 1990<sup>3</sup> or otherwise<sup>4</sup>, or has been avoided by the disclaimer of the person for whose benefit it was executed<sup>5</sup>).

A person cannot plead non est factum<sup>6</sup>, however, where the deed was merely voidable at his option when he executed it, or was void in consequence of the provisions contained in it. He cannot, therefore, plead that a deed is not his which he was induced to execute by fraud, misrepresentation, duress, or undue influence<sup>7</sup>, or which was voidable on account of his infancy<sup>8</sup>, or which was void or unenforceable for illegality<sup>9</sup>.

1 Com Dig, Pleader (2, W, 18). As to escrows see PARAS 37-39 ante.

2 *Whelpdale's Case* (1604) 5 Co Rep 119a; *Pigot's Case* (1614) 11 Co Rep 26b; Com Dig, Pleader (2, W, 18); *Shep Touch* 74; *Cock v Coxwell* (1835) 2 Cr M & R 291 at 292 per Gurney B; *Calvert v Baker* (1838) 4 M & W 417 at 418 per Parke B; Chitty on Pleading (7th Edn) 511; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75 at 79. As to alteration after execution by the party entitled see PARA 82 post.

3 I.e. the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARAS 7, 27, 32 ante. As to other cases where a seal is still required see PARA 32 ante.

4 Com Dig, Pleader (2, W, 18); *Shep Touch* 69, 74; and see PARA 76 post.

5 *Whelpdale's Case* (1604) 5 Co Rep 119a; Com Dig, Pleader (2, W, 18); *Shep Touch* 74; and see PARAS 74-75 post.

6 See PARAS 69 note 2, 70 ante.

7 *Whelpdale's Case* (1604) 5 Co Rep 119a; Com Dig, Pleader (2, W, 18); *Shep Touch* 74; *Edwards v Brown* (1831) 1 Cr & J 307 at 312-314; and see PARA 68 ante.

8 See PARA 68 note 7 ante.

9 See PARA 68 note 11 ante.



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### (iii) Disclaimer

#### 74. Right to disclaim.

No person is obliged to accept any assurance made to him or obligation undertaken in his favour without his consent<sup>1</sup>. If, therefore, any such assurance or obligation is so made or undertaken by some deed, he may disclaim the benefit of the deed; and the disclaimer need not be made by matter of record or deed, but may be made orally or by conduct<sup>2</sup>; it can, however, only be made with knowledge of the interest alleged to be disclaimed and with an intention to disclaim it<sup>3</sup>, although for this purpose detailed knowledge is not necessary, and a putative donee may, by sufficiently explicit words, disclaim whatever interest he may have without knowing in detail of what it consists<sup>4</sup>. Upon disclaimer the deed and the act evidenced thereby will become void, and if the deed contained an assurance to the person disclaiming of some estate or interest in property, the same will revest in the party who made the assurance or his representatives<sup>5</sup>. A disclaimer of an attempt inter vivos to make a gift is irrevocable and cannot be withdrawn subsequently<sup>6</sup>.

Where, however, property is conveyed to a person upon trust he may, if he has not accepted the trust, disclaim the property and the trust, and thereupon the conveyance is made void as regards him and the property revests in the settlor, but the settlor will hold the property upon the trusts declared by the deed<sup>7</sup>.

1 See Bract fo 15b, 16; Shep Touch 229, 267, 394; *Lord Wellesley v Withers* (1855) 4 E & B 750; and note 2 infra.

2 *Townson v Tickell* (1819) 3 B & Ald 31; *Bingham v Lord Clanmorris* (1828) 2 Mol 253; *Stacey v Elph* (1833) 1 My & K 195 at 199; *Begbie v Crook* (1835) 2 Bing NC 70; *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520-521; *Foster v Dawber* (1860) 8 WR 646; *Re Birchall, Birchall v Ashton* (1889) 40 ChD 436 at 439, CA; *Re Clout and Frewer's Contract* [1924] 2 Ch 230; and see PARA 62 ante. See also 5 Davidson's Precedents in Conveyancing (3rd Edn) Pt II 661n. Acceptance will be presumed until dissent is signified: see GIFTS vol 52 (2009) PARA 249.

3 *Lady Naas v Westminster Bank Ltd* [1940] AC 366 at 396, [1940] 1 All ER 485 at 504, HL, per Lord Russell of Killowen.

4 *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA.

5 See PARA 63 note 1 ante. See also *Stacey v Elph* (1833) 1 My & K 195; *Wyman v Carter* (1871) LR 12 Eq 309.

6 *Re Paradise Motor Co Ltd* [1968] 2 All ER 625, [1968] 1 WLR 1125, CA. Contrast the position where there is a gift by will (with therefore, necessarily, no living rebuffed donor): see *Re Young, Fraser v Young* [1913] 1 Ch 272; *Re Cranstoun's Will Trusts, Gibbs v Home of Rest for Horses* [1949] Ch 523, [1949] 1 All ER 871; and WILLS vol 50 (2005 Reissue) PARA 444.

7 *Jones v Jones* (1874) 31 LT 535; *Mallott v Wilson* [1903] 2 Ch 494. It seems that a release may operate as a disclaimer if that is the intention: *Nicloson v Wordsworth* (1818) 2 Swan 365 at 370, 372; and cf *Crewe v Dicken* (1798) 4 Ves 97; *Doe d Wyatt v Stagg* (1839) 5 Bing NC 564. As to disclaimer by trustees see TRUSTS vol 48 (2007 Reissue) PARAS 812-815.

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## **75. When no right to disclaim.**

When a person has unequivocally expressed his assent to some assurance made to him of some estate, interest, or right he cannot afterwards disclaim it<sup>1</sup>. Nor can he lawfully disclaim any estate, interest, or right assured to him without his concurrence if he is under some legal or equitable obligation to accept it. Thus where a person has entered into a binding contract to purchase land and has paid the price, he is bound to accept a conveyance of the legal estate in the land<sup>2</sup>; his assent was given by entering into the contract, and an attempted disclaimer of the benefit of the conveyance would be ineffectual. So trustees who have accepted and are acting in the trusts of a marriage settlement containing an agreement that the wife's after-acquired property is to be conveyed to them, cannot lawfully disclaim a conveyance to them of such property<sup>3</sup>.

1 See *Doe d Smyth v Smyth* (1826) 6 B & C 112 at 117; *Doe d Chidgey v Harris* (1847) 16 M & W 517 at 520, 524; *Bence v Gilpin* (1868) LR 3 Exch 76; *Re Lord and Fullerton's Contract* [1896] 1 Ch 228, CA.

2 *Re Cary-Elwes' Contract* [1906] 2 Ch 143.

3 See *Bence v Gilpin* (1868) LR 3 Exch 76.

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#### **(iv) Cancellation: Discharge**

##### **76. Meaning and effect of cancellation.**

The cancellation of a deed is accomplished by obliterating<sup>1</sup> or otherwise altering or defacing it with the intent that it shall become void. A deed may lawfully be cancelled either by the person who has it in his possession as being solely entitled under it or by anyone (including the party bound by the deed) to whom that person has delivered it up to be cancelled<sup>2</sup>. The deed may be cancelled by mutual consent<sup>3</sup> or under the terms of an agreement between the parties<sup>4</sup> or by order of the court<sup>5</sup>. The production of a deed in a cancelled state is prima facie evidence that it is void<sup>6</sup>.

When a deed is cancelled it becomes void, and no claim can thereafter be maintained on any covenant or promise contained in it<sup>7</sup>. The cancellation has, however, no retrospective operation; it does not make the deed void ab initio; and if the deed operated as a conveyance of any property, its cancellation does not have the effect of revesting or reconveying the estate or interest which was so assured<sup>8</sup>.

1 In the case of a deed delivered before 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force) this includes removing its seal: see s 1(11); and PARAS 7, 27, 32 ante. As to other cases where a seal is still required see PARA 32 ante.

2 See Perkins, Profitable Book ss 135-136; Vin Abr, Faits (X), pl 1-3; Shep Touch 68-70; 2 Bl Com (14th Edn) 308-309; *Harrison v Owen* (1738) 1 Atk 520.

3 See eg *Lord Ward v Lumley* (1860) 5 H & N 87.

4 See *Bamberger v Commercial Credit Mutual Assurance Society* (1855) 15 CB 676 at 693-694 (insurance policy cancelled in accordance with rules of society on failure to pay premium); and INSURANCE vol 25 (2003 Reissue) PARA 155.

5 See EQUITY vol 16(2) (Reissue) PARA 499.

6 *Knight v Clements* (1838) 8 Ad & El 215 at 220; *Earl of Falmouth v Roberts* (1842) 9 M & W 469 at 471; *Alsagar v Close* (1842) 10 M & W 576 at 583; *Meiklejohn v Campbell* (1940) 56 TLR 663 at 665 (affd 56 TLR 704, CA).

7 *Mathewson's Case* (1597) 5 Co Rep 22b at 23a; *Pigot's Case* (1614) 11 Co Rep 26b; Shep Touch 70; *Davidson v Cooper* (1843) 11 M & W 778 at 800 per Lord Abinger CB (affd (1844) 13 M & W 343, Ex Ch); *Bamberger v Commercial Credit Mutual Assurance Society* (1855) 15 CB 676 at 693-694; *Lord Ward v Lumley* (1860) 5 H & N 656 at 658 per Bramwell B. As to accidental cancellation see PARA 86 post.

8 *Nelthorpe v Dorrington* (1674) 2 Lev 113; *Lord Leech v Leech* (1674) 2 Rep Ch 100; *Lady Hudson's Case* (1704) 2 Eq Cas Abr 52, pl 5; *Magennis v Mac-Culloch* (temp 1714-1727) Gilb Ch 235 at 236; *Harrison v Owen* (1738) 1 Atk 520; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259 at 263; *Roe d Earl of Berkeley v Archbishop of York* (1805) 6 East 86; *Doe d Lewis v Bingham* (1821) 4 B & Ald 672 at 677 per Holroyd J; *Doe d Courtail v Thomas* (1829) 9 B & C 288; *Gummer v Adams* (1843) 13 Lj Ex 40; *Davidson v Cooper* (1843) 11 M & W 778 at 800 (affd (1844) 13 M & W 343, Ex Ch); *Lord Ward v Lumley* (1860) 5 H & N 87; *Re Hancock, Hancock v Berrey* (1888) 57 Lj Ch 793; and see 'The Discharge of Debts' 44 Sol Jo 481; cf *Re Way's Trusts* (1864) 2 De GJ & Sm 365.

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## **77. Mode of cancellation.**

In order that a deed may be indubitably cancelled it should be unmistakably defaced<sup>1</sup>. If the person entitled under the deed simply delivers it up undefaced to the party bound by it, and the latter were to lose possession of it, it might afterwards be put in suit against him, and in that case he would not be able to plead that it was not his deed<sup>2</sup>. It appears, however, that if the person entitled under the deed delivers it to be cancelled or as a gift to the party bound thereby, that is equivalent to a release of any right of action arising under the deed<sup>3</sup>.

<sup>1</sup> Before the 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force), every deed had to be sealed, and removal of the seal was an appropriate procedure for cancellation: see s 1(11); and PARAS 7, 27, 32 ante. It is submitted that this will still be effective in other cases where a seal is still required, eg where a company executes a deed by affixing its common seal: see PARA 32 ante.

<sup>2</sup> *Waberley v Cockerel* (1542) Dyer 51a; *Cross v Powel* (1596) Cro Eliz 483; and see PARA 69 ante.

<sup>3</sup> *Shep Touch* 70; *Harrison v Owen* (1738) 1 Atk 520; *Richards v Syms* (1740) Barn Ch 90 at 94; *Byrn v Godfrey* (1798) 4 Ves 6 at 10-11; *Duffield v Elwes* (1827) 1 Bli NS 497 at 537-540, HL; *Cross v Sprigg* (1849) 6 Hare 552 at 556. It seems that if a creditor by bond or covenant delivers up the deed to the debtor as a gift or with intention to forgive the debt, that amounts to delivering up the deed to be cancelled, as the donee will then be entitled to deface or destroy it if he will: *Barton v Gainer* (1858) 3 H & N 387; *Rummens v Hare* (1876) 1 Ex D 169, CA. See also 'The Discharge of Debts' 44 Sol Jo 481-482; and PARA 25 note 3 ante.

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## **78. Removal of seal of one party.**

If more than one party is bound by a deed, each in a several obligation or covenant and not jointly, the removal of the seal of one of them with the intention of cancellation will only avoid the deed as against that one and not as against the others<sup>1</sup>. If they are bound jointly, or jointly and severally, the valid removal of the seal of one of them will avoid the deed as against all<sup>2</sup>. These rules have very limited application since any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 in relation to instruments delivered as deeds on or after 31 July 1990<sup>3</sup>.

1 *Mathewson's Case* (1597) 5 Co Rep 22b; *Collins v Prosser* (1823) 1 B & C 682.

2 *Mathewson's Case* (1597) 5 Co Rep 22b at 23a; *Bayly v Garford* (1641) March 125 at 129; *Seaton v Henson* (1678) 2 Show 28 at 29.

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b); and PARAS 7, 27, 32 ante. As to the application of s 1(1)(b) see s 1(9); and PARA 7 text and note 4 ante.

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### **79. Putting cancelled deed in evidence.**

A cancelled deed cannot be put in evidence to maintain a claim to enforce any obligation created by it<sup>1</sup>, as the party to be bound can plead that it is not his deed<sup>2</sup>. It may, however, be put in evidence to prove that before it was cancelled it operated as a conveyance of some estate or interest in property<sup>3</sup>, or to prove any collateral fact, or any fact other than that the person who executed it thereby undertook some obligation which is now sought to be enforced under the cancelled deed<sup>4</sup>.

1 See PARA 76 note 7 ante.

2 See PARA 73 note 4 ante.

3 See PARA 76 note 8 ante.

4 *Hutchins v Scott* (1837) 2 M & W 809; *Earl of Falmouth v Roberts* (1842) 9 M & W 469 at 471; *Agricultural Cattle Insurance Co v Fitzgerald* (1851) 16 QB 432 at 440-441; *Enthoven v Hoyle* (1852) 13 CB 373 at 394, Ex Ch; *Pattinson v Luckley* (1875) LR 10 Exch 330 at 335-336.

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### **80. Discharge of contracts made by deed.**

Contracts made by deed may be discharged, either before or after breach, in the same manner in all respects as simple contracts<sup>1</sup>.

Where there are two deeds between the same parties, but of different dates, containing a covenant to settle the same property, though on different trusts, there being no reference to the first deed in the second deed and no evidence of the intention of the parties, the mere fact that one deed is dated after the other does not mean that the first is thereby superseded<sup>2</sup>.

<sup>1</sup> *Steeds v Steeds* (1889) 22 QBD 537. An obligation created by deed can be varied by simple contract in writing: *Berry v Berry* [1929] 2 KB 316. See further CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

<sup>2</sup> *Re Gundry, Mills v Mills* [1898] 2 Ch 504.

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## **(v) Alteration and Erasure: Rectification**

### **81. Alteration before execution.**

A writing proposed to be executed as a deed may be altered by erasure or interlineation or in any other way before it is so executed; any alteration so made before execution does not affect the validity of the deed<sup>1</sup>. Any alteration, erasure or interlineation appearing upon the face of a deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed<sup>2</sup>.

<sup>1</sup> Perkins, Profitable Book s 155; Co Litt 225b; Shep Touch 55; *Cole v Parkin* (1810) 12 East 471; and see *Matson v Booth* (1816) 5 M & S 223 at 226-227; *Doe d Lewis v Bingham* (1821) 4 B & Ald 672; *Hall v Chandless* (1827) 4 Bing 123; *Jones v Jones* (1833) 1 Cr & M 721. The deed must be construed as altered: *Re Duncan and Pryce* [1913] WN 117. When a writing has been so altered it is the practice to note in the attestation clause what alteration has been made, and this practice should always be followed: see Shep Touch 55.

<sup>2</sup> *Doctor Leyfield's Case* (1611) 10 Co Rep 88a at 92b; Co Litt 225b, n (1); *Trowel v Castle* (1661) 1 Keb 21 at 22; *Fitzgerald v Lord Fauconberge* (1729) Fitz-G 207 at 214 per Reynolds CB (affd sub nom *Lord Fauconberge v Fitzgerald* (1730) 6 Bro Parl Cas 295, HL); *Doe d Tatum v Catomore* (1851) 16 QB 745; *Simmons v Rudall* (1851) 1 Sim NS 115 at 136 per Lord Cranworth V-C; and see *Hobson v Bell* (1839) 3 Jur 190 at 194 per Lord Langdale MR; *Williams v Ashton* (1860) 1 John & H 115 at 118 per Wood V-C. It is otherwise in the case of a will: see WILLS vol 50 (2005 Reissue) PARAS 374-378. As to alterations etc in a contract under hand only see PARA 158 et seq post.



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## **82. Alteration after execution by party entitled.**

If an alteration (by erasure, interlineation, or otherwise) is made in a material<sup>1</sup> part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is made void. The nullifying effect of this rule<sup>2</sup> in modern conditions is confined to cases which fall strictly within its ambit, and is to be interpreted as liberally and reasonably as possible. The would-be avoider should be able to demonstrate that the alteration was one which, assuming the parties acted in accordance with the other terms of the contract, was potentially prejudicial to his legal rights or obligations under the instrument<sup>3</sup>.

The avoidance, however, is not *ab initio*, or so as to nullify any conveyancing effect which the deed has already had, but only operates as from the time of the alteration and so as to prevent the person who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made<sup>4</sup>.

A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed<sup>5</sup>, or reduces to certainty some provision which was originally unascertained and as such void<sup>6</sup>, or which may otherwise prejudice the party bound by the deed as originally executed<sup>7</sup>.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed<sup>8</sup>. The avoidance of the deed is not retrospective, and does not revest or reconvey any estate or interest in property which passed by the deed<sup>9</sup>; and the deed may be put in evidence to prove that that estate or interest so passed, or for any purpose other than to maintain a claim to enforce some agreement contained in the deed<sup>10</sup>.

1 As to the kinds of alteration which are not material see PARA 87 post.

2 This is sometimes referred to as the rule in *Pigot's Case* (1614) 11 Co Rep 26b.

3 See *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA. It is not, however, necessary for him to show that prejudice had in fact occurred.

4 *Anon* (1511) Keil 162, pl 2; *Gilford v Mills* (1511) Keil 164, pl 7; *Markham v Gonaston* (1598) Cro Eliz 626 at 627; *Pigot's Case* (1614) 11 Co Rep 26b; *Master v Miller* (1791) 4 Term Rep 320 at 329-332, 345 (on appeal (1793) 2 Hy Bl 141 at 142-143, Ex Ch); 1 Smith LC (13th Edn) 789; *Weeks v Maillardet* (1811) 14 East 568; *Langhorn v Cologan* (1812) 4 Taunt 330; *Fairlie v Christie* (1817) 7 Taunt 416; *Forshaw v Chabert* (1821) 3 Brod & Bing 158; *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch; *Fazakerly v McKnight* (1856) 6 E & B 795; *Sellin v Price* (1867) LR 2 Exch 189; *Suffell v Bank of England* (1882) 9 QBD 555 at 559-560, 571, CA; *Lowe v Fox* (1887) 12 App Cas 206 at 214, 216, HL; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; and see also *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; *Pattinson v Luckley* (1875) LR 10 Exch 330 at 333-334.

5 *Gardner v Walsh* (1855) 5 E & B 83 at 89; and see PARA 87 post. See also note 4 supra.

6 *Markham v Gonaston* (1598) Cro Eliz 626 at 627; cf para 28 note 5 ante; *Eagleton v Gutteridge* (1843) 11 M & W 465 at 468-469; *Re Barned's Banking Co, ex p Contract Corpn* (1867) 3 Ch App 105 at 115.

7 See *Burchfield v Moore* (1854) 3 E & B 683 at 686; *Gardner v Walsh* (1855) 5 E & B 83; *Aldous v Cornwell* (1868) LR 3 QB 573 at 578; *Suffell v Bank of England* (1882) 9 QBD 555 at 562-568, 572-574, CA; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455.

8 See PARA 76 ante.

9 See PARA 76 note 8 ante.

10 See PARA 79 note 4 ante.

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### **83. Alteration after execution by party liable.**

Where a deed is altered or defaced by, or by the direction of, a person subject to some liability under the deed, without the consent of the person entitled, the latter may, nevertheless, enforce that liability against him<sup>1</sup>.

<sup>1</sup> *Brown v Savage* (1674) Cas temp Finch 184. That was a case of relief in equity, but it is submitted that the modern law coincides with the rule of equity in the above respect.

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#### **84. Alteration by consent.**

If, after its execution, a deed is altered in a material<sup>1</sup> part with the consent of the person or persons liable under it, that does not of itself alone avoid the deed or preclude the party entitled under it from enforcing against that person or persons any agreement it contains<sup>2</sup>. If, however, after an instrument has been completely executed, it is altered by consent in such a way as to make it in effect a new instrument, it must be restamped; but restamping will not be necessary where the alteration was made whilst the instrument was still in course of execution or merely to correct a mistake<sup>3</sup>.

<sup>1</sup> As to the kinds of alteration which are not material see PARA 87 post.

<sup>2</sup> *Markham v Gonaston* (1598) Cro Eliz 626, 9 East 354n (blanks filled up); *Zouch v Claye* (1671) 2 Lev 35 (additional obligee added to a bond); *Paget v Paget* (1688) 2 Rep Ch 410 (blanks filled up); *Bates v Grabham* (1703) 3 Salk 444; *French v Patton* (1808) 9 East 351 at 355-357; *Matson v Booth* (1816) 5 M & S 223 at 227; *Eagleton v Gutteridge* (1843) 11 M & W 465; *Adsetts v Hives* (1863) 33 Beav 52 (as to which see PARA 87 notes 6, 8 post). In a case where the dates of a series of leases had been altered by agreement, the leases were construed, for the purpose of giving an implied right of way, according to the circumstances existing at the dates as altered: *Rudd v Bowles* [1912] 2 Ch 60.

<sup>3</sup> See the Stamp Act 1891 s 14(4) (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007. See eg *Bowman v Nichol* (1794) 5 Term Rep 537; *Cole v Parkin* (1810) 12 East 471; *Spicer v Burgess* (1834) 1 Cr M & R 129. See STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1017. As to the terms on which instruments not duly stamped may be received in evidence see generally CIVIL PROCEDURE.

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## **85. Alteration by stranger after execution.**

If after the execution of a deed it is intentionally altered in some material<sup>1</sup> part by a stranger (that is, one who is neither a party nor entitled under it), that alteration has the same effect exactly<sup>2</sup>, as against a person entitled under and having the custody of the deed, as an alteration made by that person himself, notwithstanding that the alteration was made without his consent<sup>3</sup>. Where a person entitled under a deed has no present right to keep it in his custody and therefore is not in possession of it, for example because he is entitled only on the death of some other person enjoying some interest or right for life under, and so having possession of, the deed, it appears that a material alteration made without the former person's consent while the deed is in possession of that other person will not prevent the former from putting the deed in evidence to enforce his rights under it<sup>4</sup>.

1 As to the kinds of alteration which are not material see PARA 87 post.

2 See PARA 82 ante.

3 *Pigot's Case* (1614) 11 Co Rep 26b at 27a; *Davidson v Cooper* (1843) 11 M & W 778 at 779, 801-802 (affd (1844) 13 M & W 343 at 352, Ex Ch); *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; *Robinson v Mollett* (1875) LR 7 HL 802 at 813 per Blackburn J; *Pattinson v Luckley* (1875) LR 10 Exch 330 at 333-334; *Suffell v Bank of England* (1882) 9 QBD 555 at 559, 562, 571, CA. It appears, however, that the rule so laid down is open to be reviewed in the House of Lords when the alteration is made against the will of the person having the custody: see *Lowe v Fox* (1887) 12 App Cas 206 at 216-217, HL, per Lord Herschell. The reason given for the rule in *Davidson v Cooper* supra was that the person who has the custody of an instrument is bound to preserve it in its original state. This reaffirmed one half of the strict rule of the old law (see PARA 86 note 2 post), although the principles on which the rule regarding destruction was changed seem to apply in the case of alterations (see the cases cited in para 86 note 2 post; and *Henfree v Bromley* (1805) 6 East 309 at 311-312 per Lord Ellenborough CJ; 1 Preston's Abstracts of Title (2nd Edn) 157; *Hutchins v Scott* (1837) 2 M & W 809 at 814 per Alderson B; Sugden, Treatise on Powers (8th Edn) 603). It seems also that the actual decision in *Davidson v Cooper* supra concerned an alteration made intentionally, although under a mistake of law, by a clerk or servant: see *Robinson v Mollett* (1875) LR 7 HL 802 at 814 per Blackburn J. It may well be that a person entitled under and in possession of a deed ought to be precluded from asserting that an alteration made therein by a clerk, servant, or agent entrusted by him with the custody of the deed was made without his authority (see *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241), unless, perhaps, the alteration was made for the custodian's own fraudulent purposes (see *Ruben v Great Fingall Consolidated* [1906] AC 439, HL). The case where a stranger, wrongfully and without the knowledge and against the will of the person entitled under and in possession of a deed, obtains access to and materially alters the deed appears to be entirely different; and to hold that the person injured is precluded from asserting his innocence of the alteration appears to be equivalent to ruling that he must keep the deed safe at his peril: see PARA 86 note 2 post.

4 See *Dalston v Coatsworth* (1721) 1 P Wms 731 at 732-733. That was a case of relief in equity; but it is thought that in this respect the rule of equity will now prevail: see PARA 86 note 2 post. Further, in the above case the reason given for the rule in *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch, does not apply: see note 3 supra.

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## 86. Accidental alteration of a deed.

If a deed is wholly or partially obliterated or defaced, or, in a case where a seal is still required<sup>1</sup>, the seal is detached or destroyed by accident, without the agency of some responsible human being intending so to alter it (as the case of damage done by accidental fire, animals, a child, or a person of unsound mind), this does not now avoid it or preclude its being given in evidence for any purpose<sup>2</sup>; and if a deed is damaged in this manner so that its contents have become wholly or partially illegible, secondary evidence of what was written is admissible<sup>3</sup>. It appears upon principle that, if damage of the kind mentioned is done to a deed by some human being inadvertently and unintentionally, this will not at the present day avoid the deed in any way or preclude its being put in evidence, even though the damage was done by the person entitled under and having the custody of the deed<sup>4</sup>.

1 See PARA 32 ante. As from 31 July 1990, any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b); and PARAS 7, 27, 32 ante.

2 *Doctor Leyfield's Case* (1611) 10 Co Rep 88a at 92b, 93a; *Lady Argoll v Cheney* (1626) Palm 402 at 403; *Anon* (circa 1627) Lat 226; *Clerke d Prin v Heath* (1669) 1 Mod Rep 11 per Twisden J; *Read v Brookman* (1789) 3 Term Rep 151 at 158 per Ashhurst J; *Master v Miller* (1791) 4 Term Rep 320 at 339 per Buller J; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259 at 263-264; 1 Preston's Abstracts of Title (2nd Edn) 157; 3 Preston's Abstracts of Title (2nd Edn) 103. The old law was that a party entitled under and having the custody of a deed must keep it safe and undefaced at his peril: *Nichols v Haywood* (1545) 1 Dyer 59a; *Michael v Stockwith* (1588) Cro Eliz 120; *Pigot's Case* (1614) 11 Co Rep 26b at 27a. Relief was first given in equity in case of the casual loss or destruction of a deed, the party being allowed, on proof of such loss or destruction, to give secondary evidence of the contents of the deed: *Wilcox v Sturt* (1682) 1 Vern 77 at 78; *Dalston v Coatsworth* (1721) 1 P Wms 731; *Cowper v Earl Cowper* (1734) 2 P Wms 720 at 748-750; *Cookes v Hellier* (1749) 1 Ves Sen 234 at 235 per Lord Hardwicke LC; *Whitfield v Fausset* (1750) 1 Ves Sen 387 at 389-390; *Saltern v Melhuish* (1754) Amb 247. Afterwards a lost deed was allowed to be pleaded at law without a profert (ie a form of pleading which alleged that the deed was brought into court although this was not actually done; profert was abolished by the Common Law Procedure Act 1852 s 55 (repealed)): *Read v Brookman* (1789) 3 Term Rep 151. This did not do away with the jurisdiction of courts of equity to give relief where a deed had been lost or destroyed by accident: *Atkinson v Leonard* (1791) 3 Bro CC 218 at 224; *Ex p Greenway* (1802) 6 Ves 812 at 813 per Lord Eldon LC; *Bromley v Holland* (1802) 7 Ves 3 at 19-20; *East India Co v Boddam* (1804) 9 Ves 464 at 466. It appears, therefore, that this equitable jurisdiction now resides in the High Court of Justice, and that, supposing the old law to have been to some extent reaffirmed by the case of *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch (see PARA 85 note 3 ante), the rule of equity in the above respect should now prevail: see the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 49(1); *Steeds v Steeds* (1889) 22 QBD 537; and COURTS. See also generally CIVIL PROCEDURE.

3 See the cases in equity cited in note 2 supra; and see *Medlicot v Joyner* (1667) 1 Mod Rep 4; Gilbert, Law of Evidence (6th Edn) 84-85; *Doe d Gilbert v Ross* (1840) 7 M & W 102; *Fitzwalter Peerage* (1844) 10 Cl & Fin 946 at 952-953, HL; *Moulton v Edmonds* (1859) 1 De GF & J 246 at 251. See also CIVIL PROCEDURE vol 11 (2009) PARA 878 et seq.

4 See the authorities cited at the beginning of note 2 supra; and see *Fernandey v Glynn* (1808) 1 Camp 426n; *Raper v Birkbeck* (1812) 15 East 17 at 20; *Wilkinson v Johnson* (1824) 3 B & C 428; *Novelli v Rossi* (1831) 2 B & Ad 757; *Warwick v Rogers* (1843) 5 Man & G 340 at 373; *Bamberger v Commercial Credit Mutual Assurance Society* (1855) 15 CB 676 at 693-694. It is submitted that if, in the above respect, the old law was reaffirmed by the decision in *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch (see PARA 85 note 3 ante), the case put falls within the principle on which courts of equity afforded relief, and that, under the present practice, the rule of equity should prevail (see note 2 supra). See also CIVIL PROCEDURE.

## UPDATE

## **86 Accidental alteration of a deed**

NOTE 2--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

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## 87. Immaterial alteration.

An alteration made in a deed, after its execution, in some particular which is not material<sup>1</sup> does not in any way affect the validity of the deed; and this is equally the case whether the alteration was made by a stranger<sup>2</sup> or by a party to the deed<sup>3</sup>. Thus the date of a deed may well be filled in after execution<sup>4</sup>; for a deed takes effect from the date of execution, and is quite good though it is undated<sup>5</sup>. So, also, the names of the occupiers of land conveyed may be inserted in a deed after its execution, where the property assured was sufficiently ascertained without them<sup>6</sup>. It appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written<sup>7</sup>, or which carries out the intention of the parties already apparent on the face of the deed<sup>8</sup>, provided that the alteration does not otherwise prejudice the party liable under it<sup>9</sup>. An alteration made in a deed may be material as against some party or parties thereto but immaterial as against the other or others<sup>10</sup>; and where such an alteration has been made in a deed, any agreement contained in it may be enforced against the party or parties as to whom the alteration is immaterial (if originally liable thereunder) in the same manner as if the deed had remained unaltered<sup>11</sup>.

In modern conditions it has been held that the critical question is that of prejudice or potential prejudice as a result of the alteration<sup>12</sup>.

1 See PARA 82 notes 5-7 ante.

2 *Pigot's Case* (1614) 11 Co Rep 26b at 27a. See *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA.

3 *Aldous v Cornwell* (1868) LR 3 QB 573 at 579; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455 at 459 (overruling *Pigot's Case* (1614) 11 Co Rep 26b on this point).

4 *Keane v Smallbone* (1855) 17 CB 179; *Adsetts v Hives* (1863) 33 Beav 52; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455.

5 See PARA 60 notes 1, 3 ante.

6 *Adsetts v Hives* (1863) 33 Beav 52. It is thought that where the description contained in the deed is such that it is essential to have the occupiers' names in order to ascertain what is intended to be conveyed, the addition of such names, after execution, would be a material alteration: see PARAS 28, 82 et seq ante. The alteration of the Christian names of one party was held not to avoid a deed: *Re Howgate and Osborn's Contract* [1902] 1 Ch 451; and cf *Eagleton v Gutteridge* (1843) 11 M & W 465. Likewise the striking out of the word 'Company' which had wrongly been inserted in the defendant company's name: *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA, where the bank had inserted the name, address, telephone and fax numbers of the first defendant.

7 *Waugh v Bussell* (1814) 5 Taunt 707 at 711; *Aldous v Cornwell* (1868) LR 3 QB 573 (adding 'on demand' to a promissory note).

8 *Adsetts v Hives* (1863) 33 Beav 52. The decision in that case as to filling up the date for redemption seems to go beyond the principle expressed above and to have been a benevolent judgment. It may be usual, but it is not inevitably necessary that a loan on mortgage shall be made repayable in six months' time. The alterations made in that case were all made with the consent of the mortgagor. It does not appear that the objection was taken that a new stamp was necessary: see *Eagleton v Gutteridge* (1843) 11 M & W 465 at 468-469; and PARA 84 ante.

9 See PARA 82 note 7 ante.



- 10 *Doe d Lewis v Bingham* (1821) 4 B & Ald 672.
- 11 *Hall v Chandless* (1827) 4 Bing 123.
- 12 *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA.

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## **88. Rectification.**

Where, in carrying into effect an antecedent agreement, a deed is prepared which in some particular fails to carry out the common intentions of the parties as expressed in the antecedent agreement, and the deed so prepared is executed by both or all parties without appreciating that its contents are at variance with the previous agreement (or by one or more without so appreciating, the other or others by words or conduct misrepresenting that it carries out the common intentions), the deed may be rectified (or treated as if rectified) under the equitable jurisdiction to correct mistakes of this character<sup>1</sup>.

<sup>1</sup> See *Re Bird's Trusts* (1876) 3 ChD 214; *A Roberts & Co v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Re Butlin's Settlement Trust* [1976] Ch 251, [1976] 2 All ER 483; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; *Racal Group Services Ltd v Ashmore* [1995] STC 1151, 68 TC 86, CA; and EQUITY vol 16(2) (Reissue) PARA 443; MISTAKE vol 77 (2010) PARA 57 et seq.

## **UPDATE**

## **88 Rectification**

NOTE 1--See also *Wills v Gibbs* [2007] EWHC 3361 (Ch), [2008] STC 808.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(i) Definitions/89. In general.

## **2. BONDS**

### **(1) NATURE AND USE**

#### **(i) Definitions**

##### **89. In general.**

At common law a bond is an instrument under seal<sup>1</sup>, usually a deed poll<sup>2</sup>, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date<sup>3</sup>. The person who so binds himself is called the obligor, and the person to whom he is bound the obligee; and the instrument itself is sometimes called an obligation<sup>4</sup>. Any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 in relation to instruments delivered as deeds on or after 31 July 1990<sup>5</sup>.

1 2 Bl Com (14th Edn) 340; *National Telephone Co v IRC*[1900] AC 1, HL; *British India Steam Navigation Co v IRC*(1881) 7 QBD 165 at 173, DC, per Lindley J.

2 As to deeds poll see PARA 3 ante.

3 For a wider meaning of the term 'bond' in relation to British government and local authority securities see PARA 94 post. For the use of the term by insurance companies as describing contracts offered by them primarily for investment purposes see PARA 95 post.

4 Shep Touch 367.

5 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b); and PARAS 7, 27, 32 ante. This does not include execution by a corporation sole: see s 1(10); and PARA 32 text to note 3 ante. As to the application of s 1(1)(b) see s 1(9); and PARA 7 text and note 4 ante. As to the requirements of a deed see s 1(2), (3) (as amended); and PARAS 8, 33 ante. As to the application of s 1(2), (3) (as amended) see s 1(9); and PARA 7 text and note 4 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(i) Definitions/90. Single bond.

**90. Single bond.**

A bond merely for the payment of a certain sum of money, without any condition in or annexed to it, is called a simple or single bond<sup>1</sup>. Such instruments became rare, and the term 'single bond' came to be used sometimes to signify a bond given by one obligor as distinguished from one given by two or more<sup>2</sup>.

<sup>1</sup> 2 Bl Com (14th Edn) 340; *Morant v Gough* (1827) 7 B & C 206.

<sup>2</sup> See *Merchant of Venice*, Act I, scene 3, line 146 et seq: 'Go with me to a notary, seal me there Your single bond; and, in a merry sport, If you repay me not on such a day, In such a place, such sum or sums as are Express'd in the condition, let the forfeit Be . . . '.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(i) Definitions/91. Double or conditional bond.

### **91. Double or conditional bond.**

The ordinary form of bond came to be one accompanied by a condition in the nature of a defeasance<sup>1</sup>, the performance of the condition generally being secured by a penalty. This form of bond is called a double or conditional bond<sup>2</sup>, and consists of two parts: first, the obligation, and secondly, the condition<sup>3</sup>. The condition, which may be contained in the same or another instrument, or may be indorsed on the back<sup>4</sup>, specifies the real agreement between the parties, that is to say, the money to be paid or acts or duties to be performed or observed, the payment, performance, or observance of which is intended to be secured by the bond, and it provides that on due performance of the condition the bond is to be void<sup>5</sup>. The obligation, as in the case of a single bond<sup>6</sup>, simply binds the obligor to the payment of a certain sum of money, such sum of money being usually, though not necessarily, a penalty<sup>7</sup>, and does not in terms refer to the condition. On breach of the condition the bond is said to become forfeited or absolute, though it does not follow that the obligee is entitled to recover the sum mentioned in the obligation<sup>8</sup>.

A conditional bond sometimes contains explanatory recitals. When it does so, the recitals follow the obligation and precede the condition.

1 The term 'defeasance' is more properly employed when the condition is contained in a separate instrument: *Shep Touch* 367, 396.

2 *Shep Touch* 367.

3 See *Guyana and Trinidad Mutual Fire Insurance Co Ltd v RK Plummer & Associates Ltd* (1992) 8 Const LJ 171, PC.

4 *Shep Touch* 367; *Vin Abr*, *Faits* (G).

5 The omission of words providing that the obligation is void does not affect the validity of the condition: *Mauleverer v Hawxby* (1670) 2 Saund 78.

6 See PARA 90 ante.

7 See PARA 128 post.

8 See PARA 128 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(ii) Use of Bonds/92. Use of bonds otherwise than for financial purposes.

## (ii) Use of Bonds

### 92. Use of bonds otherwise than for financial purposes.

The use of double bonds<sup>1</sup> has long been discouraged by conveyancers<sup>2</sup>, and they now only survive where required by legislation, or taken by an institution or body adhering to traditional forms, or where the form of a double bond genuinely provides a convenient means of limiting a surety's or guarantor's liability. Thus provision is still made by various enactments for giving security by a double bond for the due observance of conditions of a privilege<sup>3</sup>. The taking of a double bond to secure or guarantee the performance of a building contract is also still common<sup>4</sup>, notwithstanding judicial criticism<sup>5</sup>. A performance bond in an international commercial transaction, said to be a new creature so far as the Court of Appeal was concerned in 1978, is now commonplace<sup>6</sup>.

In addition, in civil proceedings statutory provisions relating to procedure and rules of court permit or require security to be given by a bond for the performance or discharge of a number of obligations or requirements<sup>7</sup>; the form of bond used for this purpose is generally a double bond.

In criminal proceedings, bonds are not taken but the court may require defendants or witnesses to enter into recognisances, for instance to keep the peace or be of good behaviour, or to appear at the trial<sup>8</sup>. Such recognisances may be required to be given with or without sureties<sup>9</sup>. They have the effect of a double bond, but are taken orally before an officer of the court whose record in writing is the recognisance. In proceedings relating to the care of a juvenile, his parent or guardian may be required to enter into a recognisance to take proper care of and exercise proper control over him<sup>10</sup>.

1 For the meaning of 'double bond' see PARA 91 ante.

2 See eg 5 Davidson's Precedents and Forms in Conveyancing (3rd Edn) (1878) Pt II 267. The intervention of equity (see PARA 126 post) and subsequently of statute (see PARA 126 notes 1-2 post) took away from a double bond the advantage which it would otherwise have had over an ordinary covenant or contract of penalising breach of the condition whose performance or observance it was intended to secure: a covenant or contract to perform or observe the condition gave rise, on its breach, to a claim for damages measured by the loss actually suffered, whereas the penalty of a bond was normally fixed at an amount substantially greater than this. Without any such advantage, in a period when the law of contract had been fully developed, double bonds declined in use in favour of the more readily comprehensible and straightforward covenant or simple contract. In appropriate cases, these could be enforced by specific performance or injunction as an alternative or in addition to damages, whereas such equitable remedies might not be as clearly available on a double bond: see *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; para 129 post; and CIVIL PROCEDURE; SPECIFIC PERFORMANCE.

3 See eg the Customs and Excise Management Act 1979 ss 131, 157 (as amended) (bonds for the observance of any condition in connection with customs or excise); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARAS 1104, 1167.

4 See BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(2) (Reissue) PARA 185. Such a bond is called a 'performance bond'. As to performance bonds generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1271 et seq.

5 See eg *Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Co Ltd* [1996] AC 199 at 209, [1995] 3 All ER 737 at 745, HL, per Lord Jauncey of Tullichettle, who found 'great difficulty in understanding the desire of commercial men to embody so simple an obligation in a document which is quite

unnecessarily lengthy, which obfuscates its true purpose and which is likely to give rise to unnecessary arguments and litigation as to its meaning'.

6 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; and PARA 99 post. However, as late as 1990 performance bonds were referred to as 'strange documents to an English lawyer': *IE Contractors Ltd v Lloyds Bank plc* [1990] 2 Lloyd's Rep 496 at 502, CA, per Staughton LJ.

7 See PARAS 101-102 post.

8 See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 151-152.

9 Where an accused person is released on entering with sureties into recognisances to appear to stand trial, the sureties are 'bail' for the accused. Bail can also mean the amount of the penalty of the recognisances.

10 See further CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1288.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(ii) Use of Bonds/93. Use of bonds as securities for company borrowings.

### **93. Use of bonds as securities for company borrowings.**

In the financial field, the single bond<sup>1</sup>, as an acknowledgment of the existence of, or of the liability to repay, a loan, gave way long ago to the double bond, usually in the form of a common money bond, that is, a bond conditioned for repayment of the loan with interest on the redemption date<sup>2</sup>. In its turn the double bond, as a security issued for a loan, was superseded in the middle of the nineteenth century by the modern forms of debenture and debenture stock, and now survives only where required by some of the older but still extant statutes. Thus the Companies Clauses Consolidation Act 1845<sup>3</sup> still regulates the borrowing of money on mortgage or bond by the statutory companies (incorporated by special Act of Parliament) to which it applies. Where the borrowing is secured by a bond, the Act<sup>4</sup> prescribes that the bond should be in the form scheduled to the Act<sup>5</sup> or to the like effect. The form so scheduled is that of a common money bond. However, there are now comparatively few companies to which this Act applies, and they have been authorised alternatively to raise money by the issue of debenture stock<sup>6</sup> and in some individual cases in other ways. The Companies Act 1862, and its successors, which provide for the incorporation of companies by registration, have never attempted to restrict the nature of the securities which could be issued by companies incorporated under them, in order to raise loan capital; and these companies adopted modern forms of debentures and debenture stock trust deeds in place of the older common money bonds. A bond does not have to employ any particular form of words, and the usual form of a debenture, when by deed, is in fact a single bond with a superadded provision for payment of interest on the amount of the bond, and often, in addition, further provisions which may include a charge on all or some of the assets of the company. Indeed, when the modern form of debentures was first used by companies incorporated under the Companies Act 1862, these securities were sometimes called 'bonds' or 'obligations' or 'debenture bonds', but eventually 'debentures' or, sometimes where they contained a charge, 'mortgage debentures' became the usual expressions to describe instruments of this nature issued by English companies<sup>7</sup>. A debenture is not necessarily by deed<sup>8</sup>, and the term has therefore a wider meaning than bond. Although modern company debentures, where executed by deed, are single bonds with added provisions, there is now a large body of law<sup>9</sup> relating only to debentures of companies and not to other bonds<sup>10</sup>.

1 For the meaning of 'single bond' see PARA 90 ante.

2 For the meaning of 'double bond' see PARA 91 ante. As to common money bonds see PARA 96 post. For a mid-nineteenth century form of double bond taken by a bank to secure a joint stock company's overdraft on current account see *Royal British Bank v Turquand* (1855) 5 E & B 248; on appeal (1856) 6 E & B 327, Ex Ch.

3 See the Companies Clauses Consolidation Act 1845 ss 38-55 (as amended); and COMPANIES vol 15 (2009) PARA 1736 et seq.

4 See *ibid* s 41; and COMPANIES vol 15 (2009) PARA 1740.

5 See *ibid* Sch (D); and COMPANIES vol 15 (2009) PARA 1740.

6 The Companies Clauses Act 1863 Pt III (ss 22-35) (as amended) empowered the companies to which it applied to issue debenture stock subject to the regulations contained in that Act; and by the Companies Clauses Act 1869 s 3, every statutory company having the power under the Companies Clauses Consolidation Act 1845 (see notes 3-5 *supra*) to raise money on mortgage or bond was given power to issue such debenture stock. See also COMPANIES vol 15 (2009) PARAS 1668, 1753.



7 See *Re Natal Investment Co, Claim of the Financial Corpn* (1868) 3 Ch App 355 at 356-360 per Lord Cairns LC; *Re Florence Land and Public Works Co, ex p Moor* (1878) 10 ChD 530, CA; *British India Steam Navigation Co v IRC* (1881) 7 QBD 165 at 168, DC, per Grove J, and at 172-173 per Lindley J. The use of the expression 'bonds' is still prevalent to describe securities issued by companies incorporated in countries other than the United Kingdom: see eg *Feist v Société Intercommunale Belge D'Électricité* [1934] AC 161, HL.

There is considerable overlap in the legal terminology in this field. No particular words are required to create a covenant (see PARA 249 post), and a debenture by deed, apart from being a single bond with superadded provisions, can equally well be regarded as a series of covenants. For some purposes, a debenture (or single bond), though by deed, can be treated as a promissory note: *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758; but contrast, in relation to stamp duty, *British India Steam Navigation Co v IRC* (1881) 7 QBD 165, DC.

8 See *British India Steam Navigation Co v IRC* (1881) 7 QBD 165 at 172-173, DC, per Lindley J.

9 See COMPANIES vol 15 (2009) PARA 1299 et seq.

10 For the purposes of the Companies Act 1985, 'debenture' includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not: see s 744; and COMPANIES vol 15 (2009) PARA 1299.

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#### **94. Use of bonds as British government and local authority securities.**

A more marked departure from the traditional form of bonds has occurred in regard to British government and local authority securities, but the expression 'bonds' has been retained in this field. At the present day, it may be used as describing, or as part of the name of, some issues of securities which are authorised by legislation to be effected as issues of bonds but whose documentation, also so authorised, does not involve the execution of any instrument which either resembles a traditional bond or is within the general legal definition of the word<sup>1</sup>.

<sup>1</sup> Statutory provision has long been made to allow a holder of British government bearer bonds to deliver them up for conversion into registered form and to have instead a certificate of his holding, transfer of which would thereafter require entry in a register, and to allow the converse process of taking a bearer bond in lieu of the whole or part of a registered holding: see the Exchequer Bills and Bonds Act 1866 s 27 (now repealed, but which provided for optional registration); and the Finance Act 1963 s 71(1) (as amended) (which gives to a registered holder of certain issues of government securities an option to have such a bond, and for the bond so issued to be surrendered so as to be replaced by a registered holding: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1338). In consequence many issues of government securities are held partly in registered form and partly in the form of bearer bonds, even though the whole issue is called by a name describing it as stock or as bonds. The Treasury may make regulations providing for the issue of documents of title relating to stock and bonds and as to the evidence of title to them, as well as providing for the transfer and keeping of registers of stock and bonds, and may also make regulations for regulating the issue of bearer bonds: see the Finance Act 1942 s 47 (as amended); the Bank of England Act 1946 s 1 (as amended), Sch 1 para 6; the Finance Act 1963 s 71(3); the National Loans Act 1968 s 14(3); the Post Office Act 1969 s 108(1) (as amended); the National Debt Act 1972 ss 3, 11 (both as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 807, 1335. An issue of entirely registered bonds (eg Premium Savings Bonds) none of which can be converted into bearer form may be made: (1) by issuing to (among others) the intending bondholder a prospectus containing the terms and conditions of the bonds; (2) by his completing and signing an application form which merely applies for bonds 'in accordance with the terms of the prospectus' to the value of a specified amount; (3) by his handing or sending the completed application form to the government agency together with the subscription for the bonds; and (4) by his being given one or more 'bonds', each stating the name of the issue and the nominal amount of the bond but not necessarily containing all or any of the other terms and conditions of the issue, the issue of the bonds then being registered in due course. In that event a contract is constituted by the issue of the bonds in acceptance of the application; the terms of the contract will be found in the application and the referentially incorporated prospectus. An issue of registered bonds may alternatively be made by prospectus, and application with subscription, as above, followed by entry on the register and issue of a certificate of the holding of bonds by the applicant, in precisely the same manner as an issue of registered government stock. No document can then be identified as a bond, and the expression merely denotes the contractual relationship established by the application and the allotment (in acceptance) of the holding of bonds. British government bonds are not issued under seal.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(ii) Use of Bonds/95. Bond investment business of insurance companies.

## **95. Bond investment business of insurance companies.**

Insurance companies formerly issued investment bonds under which, in return for periodical premiums, a fixed sum was payable by the insurance company at a fixed future date unrelated to any life or other contingency. A bond of this kind was drawn in the form of a double bond<sup>1</sup> imposing on the company the obligation of paying the fixed sum at the fixed date but conditioned so that the obligation was defeated if the periodic premiums were not punctually paid<sup>2</sup>. Such a bond was often used for the redemption of a capital outlay on a wasting asset, for instance a lease, and the business of issuing these contracts came to be called capital redemption business<sup>3</sup>. Since the late 1960s it has become apparent that insurance companies, with the tax privileges given to life assurance business and to purchased life annuities, could offer attractive investment contracts to the investing public. In consequence a growing variety of kinds of investment contract has been offered by insurance companies. These are usually called bonds, but in order to obtain more beneficial tax treatment they have as a rule to be written as life assurance policies or contracts for the purchase of immediate and deferred annuities<sup>4</sup>. The policy or contract is normally executed under hand, and is issued in return generally for a single payment but sometimes for periodic premiums. The issuing company may undertake liability to make payments linked in amount to the price from time to time of units of a particular unit trust, or the current value of buildings or other properties held by a particular fund, or the current value or price of some other selection of assets or commodities, or the current level of some share or other index<sup>5</sup>. The law relating to bonds is not applicable to any of these policies or contracts not by deed except in so far as it is the same as the law applicable to instruments under hand<sup>6</sup>.

1 See PARA 91 ante.

2 See the form of bond referred to in *Re British Equitable Bond and Mortgage Corpn Ltd* [1910] 1 Ch 574 at 575.

3 As to the classification of insurance business generally see INSURANCE vol 25 (2003 Reissue) PARA 9.

4 As to life assurance and annuity contracts see INSURANCE vol 25 (2003 Reissue) PARA 525 et seq.

5 For a general account of linked investment bonds of the nature described see the *Report of the Committee on Property Bonds and Equity-linked Life Assurance* (Cmnd 5281) (1973).

6 For the law relating to instruments under hand see PARA 139 et seq post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/96. Common money bonds.

### **(iii) Particular Kinds of Bond**

#### **96. Common money bonds.**

A common money bond<sup>1</sup> is one given to secure the payment of money, the condition being that if the obligor pays to the obligee a smaller sum, usually one-half of the sum named in the obligation, with interest, on a specified day, the bond is to be void.

<sup>1</sup> See also PARA 93 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/97. Post obits.

**97. Post obits.**

A post obit bond<sup>1</sup> is a bond conditioned for the payment of a sum of money after the death of a specified person, and is usually given in respect of a loan and for a sum greater than that advanced. Such bonds are of two kinds: (1) where the payment depends on a contingency, as for instance in the event of the obligor surviving a relative in regard to whom he has expectations; (2) where the payment is certain, but the time of payment uncertain, as in the case of a bond conditioned for payment of a certain sum on the death of the obligor.

<sup>1</sup> See also PARAS 120 text and note 7, 126 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/98. Lloyd's bond.

## 98. Lloyd's bond.

A Lloyd's bond<sup>1</sup> is a security issued by a company either in the form of a common money bond<sup>2</sup>, with a recital of the company's indebtedness to the obligee<sup>3</sup> or in the form of an acknowledgment of a debt to a particular person, with a covenant to pay it<sup>4</sup>. Though originally devised for the purpose of raising money, such bonds are invalid when so used by a statutory company not incorporated under the Companies Act 1985 (or enactments replaced by or replacing that Act<sup>5</sup>), unless the borrowing powers of the company authorise their issue<sup>6</sup>, except to the extent that the money raised by their issue has been legitimately applied for the company's benefit<sup>7</sup>. Where, however, the bonds are given in consideration of an existing liability incurred by the company in good faith, and not ultra vires as in the case of a debt due to a contractor for work done, they are valid<sup>8</sup>. A bond given on or after 1 January 1973 by a company incorporated under the Companies Act 1985 (or enactments replaced by or replacing that Act) cannot now be called into question on the ground of lack of capacity by reason of anything in the company's memorandum<sup>9</sup>.

1 So called after the inventor: *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 608 per Crompton J.

2 See PARA 96 ante.

3 For this form of Lloyd's bond see *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748 at 749.

4 For this form of Lloyd's bond see *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 591.

5 See COMPANIES vol 14 (2009) PARA 9 et seq.

6 *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588. As to borrowing by companies see COMPANIES vol 15 (2009) PARA 1256 et seq. See also the Transport Act 1962 s 19 (as amended); and WATER AND WATERWAYS vol 101 (2009) PARA 751.

7 *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748.

8 *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748 at 757 per Lord Hatherley LC (approving *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 611 per Blackburn J; *White v Carmarthen etc Rly Co* (1863) 1 Hem & M 786).

9 See the Companies Act 1985 s 35 (as substituted and amended); and COMPANIES vol 14 (2009) PARA 265. As to a company's capacity and formalities of carrying on business see PARA 41 note 15 ante; and COMPANIES vol 14 (2009) PARAS 256, 263, 265, 268.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/99. Performance bonds in international trade.

## **99. Performance bonds in international trade.**

In a typical case the contract will provide for the buyer to provide for the payment of the price of goods to be supplied by a confirmed letter of credit<sup>1</sup>, and the supplier arranges for a performance bond to be given for a percentage of the contract price guaranteeing performance of its obligations under the contract. A performance bond has many similarities with a letter of credit; accordingly where a bank has given a performance bond it is required to honour it according to its terms and is not concerned whether either party to the contract which underlays it is in default<sup>2</sup>. The sole exception arises in instances of fraud<sup>3</sup>. However, in the absence of clear contractual words to the contrary, it is implicit in the nature of a performance bond that there will be an accounting between the parties after the bond has been called, so that if the amount received under the bond exceeds the true loss, the party who provided the bond is entitled to recover the overpayment<sup>4</sup>.

1 As to the nature of letters of credit see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 923 et seq.

2 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *United Trading Corp'n SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n, CA; *IE Contractors Ltd v Lloyds Bank plc* [1990] 2 Lloyd's Rep 496, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 927; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 185; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 380. As to performance bonds generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1271 et seq.

3 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL; *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 Lloyd's Rep 251, CA; *United Trading Corp'n SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n, CA; *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA; *Turkiye Is Bankasi AS v Bank of China* [1998] 1 Lloyd's Rep 250, CA; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890, [1999] 2 Lloyd's Rep 187.

4 See *Cargill International SA v Bangladesh Sugar and Food Industries Corp'n* [1998] 2 All ER 406, [1998] 1 WLR 461, CA.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/100. Administration bonds.

### **100. Administration bonds.**

At one time, every person who obtained a grant of administration was required to give a bond to the principal probate registrar; such a bond was called an administration bond<sup>1</sup>. Since 1 January 1972, however, administration bonds are no longer required, but any such bond given before that date may be enforced<sup>2</sup>. Now a guarantee given in pursuance of a requirement enures for the benefit of every person interested in the administration of the estate of the deceased as if contained in a deed made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally<sup>3</sup>.

1 See the Supreme Court of Judicature (Consolidation) Act 1925 s 167(1) (repealed by the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 152(4), Sch 7). As to grants of administration see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 72 et seq.

2 See *ibid* s 167(1) (as substituted by the Administration of Estates Act 1971 s 8; now repealed (see note 1 *supra*)), which provided that as from 1 January 1972 an administrator might be required to produce sureties.

4 See the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 120(2); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 255.

### **UPDATE**

### **100 Administration bonds**

NOTES 1, 4--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/101. Replevin bonds.

**101. Replevin bonds.**

A replevin bond is a security which the owner of chattels alleged to have been wrongfully seized is required to enter into before he can obtain redelivery of the chattels; the condition of the security is that he will commence and prosecute a claim of replevin against the seizer and make a return of the goods, if so ordered in the claim<sup>1</sup>.

<sup>1</sup> See the County Courts Act 1984 s 144, Sch 1 paras 1, 2 (as amended); and DISTRESS vol 13 (2007 Reissue) PARA 1084; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1097, 1227.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iii) Particular Kinds of Bond/102. Bonds given under order of court.

## **102. Bonds given under order of court.**

A bond to be given by any person under or for the purposes of any order of the High Court or the civil division of the Court of Appeal must be given in such form and to such officer of the court as may be prescribed<sup>1</sup> and, if the court so requires, with one or more sureties<sup>2</sup>. The prescribed officer has the power to enforce the bond or to assign it, in accordance with the following provisions, to another person<sup>3</sup>.

Where by rules of court an officer is at any time substituted for the officer previously prescribed in relation to bonds of any class, such rules may provide that bonds of that class previously given are to have effect as if the name of the officer previously prescribed were references to the substituted officer<sup>4</sup>.

Where it appears to the court that the condition of a bond in accordance with the above provisions has been broken, the court may, on an application in that behalf, order that the bond be assigned to such person as may be specified in the order<sup>5</sup>. That person is then entitled to sue on the bond in his own name as if it had been originally given to him and to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of the breach of condition<sup>6</sup>.

A bond may be ordered to be given as security for the costs of proceedings<sup>7</sup>, or as security for the due performance of his duties by a receiver appointed for a mental patient by the Court of Protection<sup>8</sup>.

1 For these purposes, 'prescribed' means: (1) except in relation to fees, prescribed by rules of court: Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 151(1) (definition amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 265, Sch 10).

2 Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 135(1).

3 Ibid s 135(2).

4 Ibid s 135(3).

5 Ibid s 135(4).

6 Ibid s 135(5).

7 See now CPR 25.12-25.15. The more usual and convenient mode in which to order security for costs, however, is to require a specified sum to be paid into court within a specified period. As to the special circumstances in which security may be required and the mode of security see generally CIVIL PROCEDURE.

8 See the Court of Protection Rules 2001, SI 2001/824, rr 56-60 (as amended); and MENTAL HEALTH vol 30(2) (Reissue) PARA 710.

## **UPDATE**

## **102 Bonds given under order of court**

NOTES 1, 2--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iv) Form and Execution: Capacity of Parties/103. Essentials of valid bond.

## **(iv) Form and Execution: Capacity of Parties**

### **103. Essentials of valid bond.**

To constitute a valid bond, there must be an obligor and obligee, and a fixed sum of money in which the obligor is bound; and the instrument must be duly executed by the obligor<sup>1</sup>. Consideration is not necessary, the instrument being delivered as a deed<sup>2</sup>.

A bond executed with a blank for the name of the obligee is void, and extrinsic evidence is not admissible to supply the defect; but if it appears from the instrument as a whole to whom the obligor is intended to be bound, as where there is a recital of indebtedness to a person named, the bond is not invalid merely because the obligee's name is not mentioned in the obligatory part<sup>3</sup>.

A bond is void unless the obligor is bound in a definite sum of money<sup>4</sup>, but it is not invalid merely because the sum is improperly expressed, provided the intention is clear<sup>5</sup>.

1 Com Dig, Obligation (A); Shep Touch 56; *Dodson v Kayes* (1610) Yelv 193.

2 *Squire v Whitton* (1848) 1 HL Cas 333.

3 *Langdon v Goole* (1681) 3 Lev 21; *Lambert v Branthwaite* (1733) 2 Stra 945.

4 *Loggins v Titheton* (1612) Yelv 225.

5 *Hulbert v Long* (1621) Cro Jac 607; *Cromwell v Grunsden* (1698) 2 Salk 462; *Coles v Hulme* (1828) 8 B & C 568 (where the obligor acknowledged himself bound in 7,700 without mentioning any species of money, and there being a recital of indebtedness in various sums expressed in pounds sterling, the court supplied the word 'pounds' in the obligatory part).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iv) Form and Execution: Capacity of Parties/104. Form.

#### **104. Form.**

No particular form of words is necessary to create a bond. If the essentials of a valid bond<sup>1</sup> are present, any mode of expression by which the intention of the parties is made clear will suffice<sup>2</sup>.

A bond may be given by two or more obligors either jointly or severally, or jointly and severally<sup>3</sup>; and may be given to two or more obligees jointly or severally, or, since 1925, jointly and severally<sup>4</sup>.

The stamp duty formerly levied on bonds has been abolished<sup>5</sup>.

The difference between a bond and a covenant is one of form rather than substance. Covenants are generally found in deeds of the type formerly known as indentures, whereas a bond is usually a deed poll<sup>6</sup>; and a covenant expresses the real agreement between the parties, the penalty or sum fixed by way of liquidated damages, if any, being the subject of a further covenant, whereas in a bond the only undertaking of the obligor is to pay a certain sum of money, such sum in a double bond being either a penalty or liquidated damages, and the real obligation being then expressed in the superadded condition, on due performance of which the instrument is avoided.

1 See PARA 103 ante.

2 Shep Touch 368.

3 See PARA 117 post.

4 See PARA 116 post.

5 See the Stamp Act 1891 s 1, Sch 1 (repealed). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1066 et seq.

6 As to deeds poll and indentures see PARA 3 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iv) Form and Execution: Capacity of Parties/105. Execution.

### **105. Execution.**

The ordinary rules relating to deeds apply to bonds in regard to their method of execution<sup>1</sup>, the possibility of execution in escrow<sup>2</sup>, and the time from which execution has effect<sup>3</sup>.

Where two or more persons are intended to be bound jointly, or jointly and severally, and the bond is executed by one of them only, it will operate at law as his several bond. However, in equity he may be entitled to have it delivered up to be cancelled as being contrary to intention<sup>4</sup>.

1 See PARAS 27-36, 40-56 ante.

2 See PARAS 37-39 ante.

3 See PARA 60 ante.

4 See PARA 62 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iv) Form and Execution: Capacity of Parties/106. Obligor.

### **106. Obligor.**

The capacity of a person to become an obligor depends, generally speaking, on his capacity to contract<sup>1</sup>. Nevertheless, though a minor<sup>2</sup> may bind himself to pay a reasonable price for necessities supplied to him, a bond given by him to secure such payment is either voidable or, if penal, void<sup>3</sup>.

1 As to capacity to contract see CONTRACT vol 9(1) (Reissue) PARA 630.

2 A minor is a person who has not attained the age of 18: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

3 *Martin v Gale* (1876) 4 ChD 428; *Fisher v Mowbray* (1807) 8 East 330; *Baylis v Dineley* (1815) 3 M & S 477; *Ayliff v Archdale* (1603) Cro Eliz 920; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 21. It seems that *Russel v Lee* (1663) 1 Lev 86 must now be considered overruled.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(1) NATURE AND USE/(iv) Form and Execution: Capacity of Parties/107. Obligee.

**107. Obligee.**

Minors<sup>1</sup>, persons of unsound mind<sup>2</sup>, and others with limited or no capacity to contract<sup>3</sup> may be obligees because, as a bond is a unilateral contract, the person to whom it is given does not thereby incur any liability. A bond given to a corporation sole (for example, to a bishop) enures to his successors in office and, where so given during a vacancy in the office, takes effect on the vacancy being filled as if it had been filled before the bond was given<sup>4</sup>.

1 Bac Abr, Obligations (D2); and see PARA 106 note 2 ante. As to the contractual capacity of such persons see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq. See also note 3 infra.

2 Bac Abr, Obligations (D2). As to the contractual capacity of such persons see MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq. See also note 3 infra.

3 For capacity to contract see CONTRACT vol 9(1) (Reissue) PARA 630.

4 See the Law of Property Act 1925 ss 180(1), (3), 205(1)(xx); the Administration of Estates Act 1925 s 3(5); and CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1248, 1271.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/108. Construction of bonds.

## **(2) OPERATION**

### **(i) In general**

#### **108. Construction of bonds.**

The rules as to the interpretation of deeds generally apply to bonds so far as material to them<sup>1</sup>.

In applying the rule that, as a last resort, words should be construed more strongly against the grantor or covenantor<sup>2</sup>, the obligatory part of a double bond<sup>3</sup>, being a covenant by the obligor for the benefit of the obligee, is always construed more strongly against the obligor; but since the condition is not itself a covenant and is for the benefit of the obligor, it apparently falls to be construed more strongly in his favour<sup>4</sup>.

1 For interpretation generally see PARA 164 et seq post. As to uncertainty in the condition of a double bond, or repugnancy between the condition and obligation of such a bond see PARA 119 post. As to implications where no time is fixed for performance of the condition see PARA 121 post. See also *Girozentrale und Bank der Oesterreichischen Sparkassen Atkiengesellschaft v TOSG Trust Fund Ltd* (1992) Financial Times, 5 February, CA; *TOSG Trust Fund Ltd v Girozentrale und Bank der Oesterreichischen Sparkassen Atkiengesellschaft* (1992) Financial Times, 10 June.

2 As to this rule see PARAS 178-179 post.

3 For the meaning of 'double bond' see PARA 91 ante.

4 *Shep Touch* 375. It should be noted that, in order to avoid the bond, the condition must be strictly performed according to its true construction: see PARA 121 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/109. Liability under bonds.

### **109. Liability under bonds.**

The effect of a single bond<sup>1</sup> is simply to create a specialty debt for the amount of the obligation. The effect of a double or conditional bond at common law was to impose a liability on the obligor to perform the condition, or on its breach to pay the sum named in the obligatory part; but where that sum is a penalty the obligee is now only entitled on breach of the condition to recover a sum commensurate with the actual loss sustained by the breach<sup>2</sup>.

A bond made under seal after 31 December 1881 but before 31 July 1990<sup>3</sup> or, subsequently, a bond executed as a deed<sup>4</sup> binds the real estate as well as the personal estate of the obligor, subject to the expression of an intention to the contrary<sup>5</sup>.

1 For the meaning of 'single bond' see PARA 90 ante.

2 See PARA 126 post. For the meaning of 'double bond' see PARA 91 ante.

3 Ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARAS 7, 27, 32 ante.

4 Ie in accordance with *ibid* s 1 (as amended) after its coming into force: see note 3 *supra*.

5 Law of Property Act 1925 s 80(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(8), Sch 1 paras 1, 4). On the death of the obligor his real and personal estate pass to his personal representative; they are assets for payment of his debts, and may be followed by creditors notwithstanding any assent of the personal representative: see the Administration of Estates Act 1925 ss 1, 32, 38 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 387-388.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/110. Priority in administration of assets.

**110. Priority in administration of assets.**

Voluntary bonds are not postponed until after the satisfaction of other debts for valuable consideration in the administration of the assets of a deceased obligor; nor do bond debts for valuable consideration have priority over simple contract debts<sup>1</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 s 32(1); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 387. As to insolvent estates of deceased persons see the Insolvency Act 1986 s 421 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 499.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/111. Bond by two or more persons.

### **111. Bond by two or more persons.**

Where a bond is entered into by two or more persons by which they bind themselves and each of them, the liability is normally joint and several<sup>1</sup>, but if each binds himself for a distinct sum the liability will be construed as several only<sup>2</sup>. Where there are no words of severance, prima facie the obligation is only joint, but it may be construed as joint and several if that appears to have been the intention having regard to the terms of the instrument as a whole<sup>3</sup>.

1 In the following cases the obligation was held to be joint and several: 'Know all men that we are bound . . . for payment whereof I bind myself, my heirs, etc . . . Sealed with our seals' (*Sayer v Chaytor* (1699) 1 Lut 695); where A and B were expressed to bind themselves jointly and severally, the condition being that if they or either of them duly paid an annuity to C for life in the following manner, namely one moiety by A during his life and the other moiety by B during the life of A, and after the death of A the whole by B, his heirs, etc, during the life of C, the bond was to be void (*Church v King* (1836) 2 My & Cr 220); where three bound themselves jointly and their respective heirs etc to pay etc conditioned to be void if they or either of them paid etc (*Tippins v Coates* (1853) 18 Beav 401).

2 *Collins v Prosser* (1823) 1 B & C 682 (where the bond was for payments of £1,000 each 'for which payment we bind ourselves, and each of us for himself, for the whole and entire sum of £1,000 each'); *Armstrong v Cahill* (1880) 6 LR Ir 440 (where a bond expressed 'We . . . are held and firmly bound in the sum of £50 each . . . to which payment . . . we hereby bind us and each of us, our and each of our heirs, etc,' was held the separate bond of each for £50).

3 See PARA 117 post. As to joint and several covenants see PARAS 260, 263 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/112. When agreement to pay interest implied.

### **112. When agreement to pay interest implied.**

When a bond is conditioned for the payment of a lesser sum of money, interest is recoverable though not expressly reserved, an agreement for payment of interest being implied; and if no date for payment is specified, interest runs from the date of the bond<sup>1</sup>. However, this implication only arises in the case of a penalty bond, that is, where the sum named in the obligatory part is in excess of that named in the condition. A bond in a specified sum conditioned for the payment of the same sum, without interest being mentioned, is, in effect, a single bond<sup>2</sup>, and the amount recoverable on the bond is the principal sum without interest<sup>3</sup>.

1 *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA; *Farquhar v Morris* (1797) 7 Term Rep 124. As to the limiting of the aggregate amount recoverable to the amount of the penalty see PARA 128 post.

2 For the meaning of 'single bond' see PARA 90 ante.

3 *Hogan v Page* (1798) 1 Bos & P 337. As to the power of the High Court to award interest on debts and damages see the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 35A (as added); and DAMAGES vol 12(1) (Reissue) PARA 848; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307.

### **UPDATE**

### **112 When agreement to pay interest implied**

NOTE 3--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/113. Gold clauses.

### **113. Gold clauses.**

Clauses to secure payment on a gold value basis are binding and payment must be made in accordance with their provisions<sup>1</sup>. However, in stating an amount, a mere reference to gold coin, or to paper currency equivalent to gold coin, without specifying the weight and fineness of the coin, is to be construed prima facie as a statement of the monetary amount of the debt and not as a requirement to make actual payment in gold or payment measured by the current free market or official price of gold<sup>2</sup>. Where the matter is subject to foreign legislation, the purpose of a gold clause may be defeated<sup>3</sup>. Payment of interest on a gold basis will not be enforced unless the terms of the gold clause expressly extend to interest<sup>4</sup>.

1 *Feist v Société Intercommunale Belge D'Électricité* [1934] AC 161, HL. As to the construction of references to gold see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1299.

2 *Campos v Kentucky and Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459; *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127, [1956] 2 All ER 33, CA; and cf *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, [1943] 2 All ER 406, PC.

3 *R v International Trustee for Protection of Bondholders Aktiengesellschaft* [1937] AC 500, [1937] 2 All ER 164, HL; and contrast *New Brunswick Rly Co v British and French Trust Corp Ltd* [1939] AC 1, [1938] 4 All ER 747, HL (proceedings commenced before legislation passed). See also *Assicurazioni Generali v Selim Cotran* [1932] AC 268, PC.

4 *New Brunswick Rly Co v British and French Trust Corp Ltd* [1939] AC 1, [1938] 4 All ER 747, HL; *Apostolic Throne of St Jacob v Saba Eff Said* [1940] 1 All ER 54, PC (where the conduct of the parties in making payments of interest in the gold equivalent of the original amount was, under Palestinian law, treated as a conclusive admission that a bond was to be construed as so providing but would not necessarily be followed in favour of a plaintiff or claimant where English law applied); and see PARA 206 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/114. Merger of simple contract debt.

#### **114. Merger of simple contract debt.**

Where a bond is given to secure the payment of a simple contract debt, the simple contract debt will merge in the specialty<sup>1</sup>, provided that the parties are the same, and that the specialty is co-extensive with the simple contract debt<sup>2</sup>, and provided that there is no intention to the contrary<sup>3</sup>.

If the specialty is not co-extensive with the debt secured by it, as where a bond conditioned for the payment of a limited amount was given to secure the payment of a sum then due, and such further sums as might become due, without specifying any limit to such further sums, it will not operate as a merger<sup>4</sup>; and there will be no merger where the bond is only taken by way of collateral or additional security<sup>5</sup>.

1 *Price v Moulton* (1851) 10 CB 561; *Owen v Homan* (1851) 3 Mac & G 378.

2 *Boaler v Mayor* (1865) 19 CBNS 76.

3 *Stamps Comr v Hope* [1891] AC 476 at 483, PC; *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 51, [1952] 1 All ER 549 at 551, CA, per Somervell LJ, and at 53 and 552 per Denning LJ.

4 *Norfolk Rly Co v M'Namara* (1849) 3 Exch 628; *Holmes v Bell* (1841) 3 Man & G 213.

5 *Holmes v Bell* (1841) 3 Man & G 213; *Twopenny v Young* (1824) 3 B & C 208.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/115. Estoppel of obligor by recitals.

### **115. Estoppel of obligor by recitals.**

Where a bond contains recitals, the obligor is estopped from denying the truth of the facts recited, but not so the obligee<sup>1</sup>. Thus if it is recited that the obligor has received certain moneys due to the obligee, the obligor will not be permitted to prove that he never in fact received such moneys<sup>2</sup>. So if a bond is conditioned for the payment of rent of premises recited to be demised by an instrument at a specified rent, the obligor is estopped from showing that the instrument was never executed, or that a lower rent was reserved thereby than that mentioned in the recital, even if such was the fact<sup>3</sup>. Nor where a particular consideration is recited can the obligor show that the consideration was in fact different, except for the purpose of showing that it was unlawful, and that the bond is therefore void<sup>4</sup>.

1 *Baker v Dewey* (1823) 1 B & C 704; *Rowntree v Jacob* (1809) 2 Taunt 141.

2 *Shelley v Wright* (1737) Willes 9. See ESTOPPEL vol 16(2) (Reissue) PARAS 1014-1015.

3 *Hosier v Searle* (1800) 2 Bos & P 299. However, such estoppel will be overridden by the existence of a valid claim to rectification of the bond: see *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL (commenting on *Lainson v Tremere* (1834) 1 Ad & El 792); and see also *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470.

4 *Hill v Manchester and Salford Water Works Co* (1831) 2 B & Ad 544.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/116. Two or more obligees.

### **116. Two or more obligees.**

A bond given, since 1925, to two or more obligees<sup>1</sup> may be given to them jointly and severally, or jointly or severally<sup>2</sup>. The general rule is that, if the interest of the obligees is joint, the bond will be deemed to have been given to them jointly, and if their interests are several, then severally<sup>3</sup>; but express words in the bond clearly demonstrating a contrary intention will prevail<sup>4</sup>. In the case of a bond which is joint only, the right passes to the survivors on the death of one of the obligees, and they alone can enforce the obligation, the representatives of the deceased not being entitled to sue<sup>5</sup>. If the bond is several, the representatives of a deceased obligee may sue or join with the survivors in suing on it<sup>6</sup>. A bond executed after 31 December 1881, with two or more obligees jointly, to pay money or do any other act is deemed, in the absence of the expression of an intention to the contrary, to include an obligation to pay the money or do the act to or for the benefit of the survivor or survivors of them and of any other person to whom the right to sue on the bond devolves, and where executed after 31 December 1925, is to be construed as being also made with each of them<sup>7</sup>. In the case of a bond executed after 31 December 1881, if the money is expressed to be owing to two or more on a joint account, it is, in the absence of the expression of an intention to the contrary, deemed to remain money belonging to them on joint account, as between them and the obligor, so as to entitle the survivor or survivors, or the representatives of the last survivor, to give a good discharge<sup>8</sup>.

1 As to claims on joint, and joint and several, bonds see PARA 131 post.

2 A bond made since 1925 with two or more obligees jointly is to be construed as being also made with each of them (see the Law of Property Act 1925 s 81(1)), unless a contrary intention is expressed (s 81(3)). In its application to instruments made after 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force (see s 1(11); and PARAS 7, 27, 32 ante), the Law of Property Act 1925 s 81(1) is modified: see s 81(5) (as added); para 264 post; and CONTRACT vol 9(1) (Reissue) PARAS 1081-1082. It appears that a bond given before 1926 could not be given jointly and severally: *Bradburne v Botfield* (1845) 14 M & W 559.

3 See *Steeds v Steeds* (1889) 22 QBD 537; *Haddon v Ayers* (1858) 1 E & E 118; *Palmer v Mallet* (1887) 36 ChD 411, CA.

4 See PARA 265 post.

5 *Martin v Crompe* (1698) 1 Ld Raym 340; *Anderson v Martindale* (1801) 1 East 497.

6 *Withers v Bircham* (1824) 3 B & C 254; *Palmer v Sparshott* (1842) 4 Man & G 137.

7 See the Law of Property Act 1925 s 81(1), (3), (4); and note 2 supra.

8 See *ibid* s 111; para 137 post; and MORTGAGE vol 77 (2010) PARA 212.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(i) In general/117. Two or more obligors.

### **117. Two or more obligors.**

Two or more obligors may be bound jointly, severally, or jointly and severally<sup>1</sup>. If bound severally, each incurs a separate liability according to the terms of the bond, which will bind his estate and personal representatives. If bound jointly only, the obligation devolves upon the survivors on the death of an obligor, and the estate and representatives of a deceased obligor, other than those of the last survivor, are under no liability<sup>2</sup>. However, a bond, though joint in form, may, in the administration of the estate of a deceased obligor, be construed as joint and several, especially in the case of a bond given by partners, or in substitution for a pre-existing joint and several liability<sup>3</sup>. Where the obligors are bound jointly and severally, the personal representatives of a deceased obligor are liable jointly and severally with the survivors<sup>4</sup>.

1 See PARA 111 ante. As to actions on joint, and joint and several, bonds see PARA 131 post. As to the discharge of such bonds see PARA 138 post.

2 *White v Tyndall* (1888) 13 App Cas 263, HL.

3 *Beresford v Browning* (1875) 1 ChD 30, CA; *Lane v Williams* (1693) 2 Vern 292; *Devaynes v Noble, Sleech's Case* (1816) 1 Mer 529 at 564; *Primrose v Bromley* (1739) 1 Atk 89; *Levy v Sale* (1877) 37 LT 709; *Summer v Powell* (1816) 2 Mer 30; *Richardson v Horton* (1843) 6 Beav 185.

4 *Burns v Bryan (or Martin)* (1887) 12 App Cas 184, HL; *Tippins v Coates* (1853) 18 Beav 401; *Church v King* (1836) 2 My & Cr 220.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(ii) Conditions/A. VALIDITY AND EFFECT/118. Validity of condition.

## **(ii) Conditions**

### **A. VALIDITY AND EFFECT**

#### **118. Validity of condition.**

A condition, to be valid, must be for the performance of an act which is possible and lawful<sup>1</sup>, and it must not be repugnant to the obligation.

Where a condition underwritten or indorsed is for the performance of an act which is impossible, the condition is void but the obligatory part of the bond valid<sup>2</sup>; but where such a condition is incorporated with the obligatory part, the bond is altogether void<sup>3</sup>. A condition is not invalid merely because it provides for the performance of an act or the happening of an event which, though possible, is extremely improbable<sup>4</sup>.

Where a condition is for the performance of two distinct acts, one of which is impossible, the obligor is bound to perform the other<sup>5</sup>; but if both acts were possible at the time of the execution of the bond, and one of them is made impossible by the act of the obligee, the obligor is altogether excused<sup>6</sup>.

1 As to unlawful conditions see PARA 120 post.

2 *Pullerton v Agnew* (1703) 1 Salk 172; *Duvergier v Fellowes* (1832) 1 Cl & Fin 39, HL; *Holmes v Ivy* (1678) 2 Show 15.

3 Com Dig, Condition (D 8).

4 *Campbell v French* (1795) 6 Term Rep 200 at 211, Ex Ch, per Lord Kenyon CJ.

5 *Da Costa v Davis* (1798) 1 Bos & P 242.

6 Com Dig, Condition (K 2); *Duvergier v Fellowes* (1828) 5 Bing 248. As to supervening impossibility see PARA 123 post.

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**119. Uncertainty or repugnancy.**

Where the condition of a bond is expressed in such language as to be unintelligible<sup>1</sup>, or is so uncertain that its meaning cannot be ascertained, but the obligatory part is clear, the condition is void, and the obligation binding<sup>2</sup>.

Where the condition is repugnant to the obligation, the condition is void and the obligation binding<sup>3</sup>.

The condition may in certain circumstances be limited or restrained by recitals to the bond or an indorsement on it<sup>4</sup>.

1 *Marker v Cross* (1613) 2 Bulst 133.

2 *Shep Touch* 373; and cf *Mauleverer v Hawxby* (1670) 2 Saund 78; *Vernon v Alsop* (1663) 1 Lev 77. As to uncertainty in documents generally see PARAS 214-216 post.

3 *Shep Touch* 373; *Com Dig*, Condition (D 8); *Roberts v Harnage* (1704) 2 Salk 659; *Wells v Ferguson* (1708) 11 Mod Rep 191 at 199. As to repugnancy in documents see PARAS 211-212 post.

4 See PARAS 218, 220 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(ii) Conditions/A. VALIDITY AND EFFECT/120. Unlawfulness.

## 120. Unlawfulness.

If the condition of a bond or the consideration for which it is given is unlawful, the bond is wholly void; and extrinsic evidence is admissible to prove the true nature of the transaction where it does not appear on the face of the instrument<sup>1</sup>.

Where the condition is entire, and any portion of it is unlawful, the bond is entirely void<sup>2</sup>; but if it consists of several distinct parts, some of which are lawful and others unlawful, or if there are several independent conditions, some lawful and others unlawful, the bond is valid and subject only to such parts of the condition or such of the conditions, as the case may be, as are lawful<sup>3</sup>.

The following are instances of bonds given on conditions or for considerations which are unlawful<sup>4</sup>:

- 1 (1) bonds in consideration of future illicit cohabitation<sup>5</sup>;
- 2 (2) bonds in unreasonable restraint of trade<sup>6</sup>;
- 3 (3) bonds in general restraint of marriage<sup>7</sup>;
- 4 (4) marriage brokerage bonds<sup>8</sup>;
- 5 (5) bonds conditioned for the commission of a crime or tort<sup>9</sup>;
- 6 (6) simoniacal resignation bonds<sup>10</sup>;
- 7 (7) bonds for money lost at gaming<sup>11</sup>;
- 8 (8) bonds tending to affect the due administration of criminal justice<sup>12</sup>;
- 9 (9) bonds relating to a prohibited contract for the supply of goods<sup>13</sup>.

Post obit bonds, whether absolute or contingent, are not as such invalid<sup>14</sup>. However, where the consideration is inadequate, or the rate of interest exorbitant, relief may be granted in equity, especially in the case of expectant heirs and reversioners<sup>15</sup>.

Where a bond or other security has been given or a debt incurred for an unlawful consideration, and a bond is given in lieu thereof or as security therefor, that bond is also void if the obligee has knowledge of the circumstances<sup>16</sup>; but the validity of the subsequent bond is not affected by the unlawfulness of the original consideration if the obligee is unaware of it<sup>17</sup>.

1 *Collins v Blantern* (1767) 2 Wils 341; *Paxton v Popham* (1808) 9 East 408; *Greville v Attkins* (1829) 9 B & C 462; *Lound v Grimwade* (1888) 39 ChD 605.

2 *Collins v Blantern* (1767) 2 Wils 341; *Norton v Syms* (1613) Moore KB 856; *Baker v Hedgecock* (1888) 39 ChD 520; *Yale v R* (1721) 6 Bro Parl Cas 27, HL.

3 *Green v Price* (1845) 13 M & W 695; *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA; *Newman v Newman* (1815) 4 M & S 66; *Collins v Gwynne* (1831) 5 Moo & P 276 at 282; *Yale v R* (1721) 6 Bro Parl Cas 27, HL.

4 As to the condition becoming unlawful see PARA 123 post; and as to unlawful contracts generally see CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

5 *Walker v Perkins* (1764) 3 Burr 1568. However, a bond given in consideration of past illicit intercourse on the determination of the connection is valid (*Marchioness of Annandale v Harris* (1727) 2 P Wms 432, HL; *Turner v Vaughan* (1767) 2 Wils 339; *Priest v Parrot* (1751) 2 Ves Sen 160; *Nye v Moseley* (1826) 6 B & C 133), provided there is no intention to continue the connection in the future (*Friend v Harrison* (1827) 2 C & P 584; *Re Vallance, Vallance v Blagden* (1884) 26 ChD 353).

6 *Mitchel v Reynolds* (1711) 1 P Wms 181; *Baker v Hedgecock* (1888) 39 ChD 520; and contrast *Gravelly v Barnard* (1874) LR 18 Eq 518. See further COMPETITION vol 18 (2009) PARA 377 et seq.

7 *Hartley v Rice* (1808) 10 East 22. See further CONTRACT vol 9(1) (Reissue) PARA 862.

8 *Roberts v Roberts* (1730) 3 P Wms 66 at 76; *Drury v Hooke* (1686) 1 Vern 412.

9 Shep Touch 371; *Collins v Blantern* (1767) 2 Wils 341.

10 *Fletcher v Lord Sondes* (1827) 3 Bing 501; and see ECCLESIASTICAL LAW vol 14 para 833.

11 See the Gaming Act 1710 s 1 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 327. This provision is repealed (subject to transitional provisions) by the Gaming Act 2005 ss 334(1)(a), 356(3)(a), (4), Sch 17 as from 1 September 2007.

See also *Sigel v Jebb* (1819) 3 Stark 1. Note that *Bubb v Yelverton* (1870) LR 9 Eq 471 (where a bond given to avoid the consequences of non-payment of a racing debt was held valid) was overruled by *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, [1949] 2 All ER 452, HL.

12 *Lound v Grimwade* (1888) 39 ChD 605 (where one of the considerations for a bond was that criminal proceedings should be so conducted that the name of a certain person should not be mentioned); *Herman v Jeuchner* (1884) 15 QBD 561, CA (indemnifying bail); *Williams v Bayley* (1866) LR 1 HL 200.

13 *Wahda Bank v Arab Bank plc* [1994] 2 Lloyd's Rep 411 (it was unlawful to make a payment under the bond, which related to a contract for the supply of goods prohibited under the Libya (United Nations Sanctions) Order 1992, SI 1992/975 (revoked) (see now the Libya (United Nations Sanctions) Order 1993, SI 1993/2807 (as amended)), even though the company which had contracted to supply the goods was no longer able to perform the contract by reason of insolvency).

14 See *Adames v Hallett* (1868) LR 6 Eq 468, where the rights of an obligee under a voluntary post obit bond are discussed. For the meaning of 'post obit bonds' see PARA 97 ante.

15 *Earl of Aylesford v Morris* (1873) 8 Ch App 484; *Fry v Lane, Re Fry, Whittet v Bush* (1888) 40 ChD 312; *Nevill v Snelling* (1880) 15 ChD 679; *Cooke v Lamotte* (1851) 15 Beav 234.

16 *Amory v Meryweather* (1824) 2 B & C 573 (bond in lieu of a promissory note given in respect of illegal stock-jobbing transactions); *Fisher v Bridges* (1854) 3 E & B 642, Ex Ch.

17 *Cuthbert v Haley* (1799) 8 Term Rep 390.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(ii) Conditions/B. PERFORMANCE OR BREACH/121. Condition to be strictly performed: time for performance.

## **B. PERFORMANCE OR BREACH**

### **121. Condition to be strictly performed: time for performance.**

In order to avoid a bond, the condition must be strictly performed, so as to carry out the object and intention of the parties<sup>1</sup>. If a particular day is named either for the payment of money or for the performance of any other act, the payment must be made or the act performed on or before the day mentioned<sup>2</sup>. When the condition is for the payment of money, and no time is mentioned for payment, the money is payable immediately<sup>3</sup>; and when it is for the performance of any other act, the act must be performed within a reasonable time<sup>4</sup>.

In neither case is it necessary that there should be any demand for payment or performance<sup>5</sup> in the absence of an express stipulation to that effect<sup>6</sup>.

Where the condition requires payment by instalments or the performance of several acts, the bond will become absolute on default in respect of any one instalment, or in performance of any one of such acts<sup>7</sup>.

1 2 Wms Saund 48; *Taylor v Bird* (1750) 1 Wils 280; *Bigland v Skelton* (1810) 12 East 436; *Bache v Proctor* (1780) 1 Doug KB 382; *Cutler v Southern* (1667) 1 Saund 116; *Ker v Mitchell* (1786) 2 Chit 487; *Skinners' Co v Jones* (1837) 3 Bing NC 481; *London, Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 736; *Goad v Empire Printing and Publishing Co Ltd* (1888) 52 JP 438.

2 *Bigland v Skelton* (1810) 12 East 436; *Hodgson v Bell* (1797) 7 Term Rep 97; Com Dig, Condition (G).

3 *Farquhar v Morris* (1797) 7 Term Rep 124; Shep Touch 369; Vin Abr, Condition (C b); *Gibbs v Southam* (1834) 5 B & Ad 911; and contrast *Carter v Ring* (1813) 3 Camp 459.

4 Co Litt 208a, b.

5 *Gibbs v Southam* (1834) 5 B & Ad 911; Vin Abr, Condition (C b).

6 *Carter v Ring* (1813) 3 Camp 459; *Capp v Lancaster* (1597) Cro Eliz 548; *Fitzhugh v Dennington* (1704) 2 Salk 585.

7 *Grey v Friar* (1850) 15 QB 901 at 910, Ex Ch; *Coates v Hewit* (1744) 1 Wils 80.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(ii) Conditions/B. PERFORMANCE OR BREACH/122. Precedent act of obligee.

### **122. Precedent act of obligee.**

Where the performance of the condition by the obligor depends on some precedent act on the part of the obligee, the obligation of the obligor does not attach unless and until the precedent act is duly performed<sup>1</sup>. Thus in the case of a bond conditioned for the performance of one of two things within a certain time at the election of the obligee, performance is excused unless the obligee makes his election within the time limited<sup>2</sup>. However, when the precedent act has been duly performed, it is not necessary, as a general rule, that the obligor should have notice of it in order that his liability should attach<sup>3</sup>.

1 2 Wms Saund 107b note 3; Vin Abr, Condition (Y c); *Buckland v Barton* (1793) 2 Hy Bl 136; *Campbell v French* (1795) 6 Term Rep 200, Ex Ch.

2 Bac Abr, Condition (P) 3.

3 *Ker v Mitchell* (1786) 2 Chit 487; *Cutler v Southern* (1667) 1 Saund 116.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(2) OPERATION/(ii) Conditions/B. PERFORMANCE OR BREACH/123. Supervening impossibility of performance.

### **123. Supervening impossibility of performance.**

Performance of the condition is excused and the obligor discharged from the bond if, though possible at the time of the execution of the bond<sup>1</sup>, performance has become impossible by act of God<sup>2</sup>, act of the legislature<sup>3</sup>, or act of the obligee<sup>4</sup>. So if the condition is in the disjunctive, and gives the obligor the option of performing one or other of two things, the bond will generally be discharged, if, both being possible at the time of the execution of the bond, the performance of either of them becomes impossible by the act of God<sup>5</sup>, or the act of the obligee<sup>6</sup>; though, in the case of discharge by the act of God, the question probably depends in each case on the intention of the parties<sup>7</sup>. However, the obligor is not excused by performance becoming impossible where the impossibility is caused by his own act or neglect<sup>8</sup>.

1 As to the position where a condition is originally impossible of performance see PARA 118 ante.

2 Bac Abr, Conditions (N Q); *Thomas v Howell* (1692) 1 Salk 170; Shep Touch 372; Vin Abr, Condition (G c); Co Litt 206a; Com Dig, Condition (D 1); *Brown v London Corp* (1861) 9 CBNS 726 at 747 per Williams J (affd (1862) 13 CBNS 828); *Earl of Leitrim v Stewart* (1870) IR 5 CL 27.

3 *Davis v Cary* (1850) 15 QB 418; *Brown v London Corp* (1862) 13 CBNS 828.

4 Co Litt 206b; Vin Abr, Obligation (R) 2-4; Com Dig, Condition (K 2) (L 5); *Duvergier v Fellows* (1828) 5 Bing 248 at 265-266 (affd on other grounds (1830) 10 B & C 826; on appeal (1832) 1 Cl & Fin 39, HL). As to the effect upon a contract of supervening impossibility of performance see CONTRACT vol 9(1) (Reissue) PARAS 888-893, 897 et seq. As to the effect of an alien becoming an enemy see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 573.

5 *Laughter's Case* (1595) 5 Co Rep 21b; *Earl of Leitrim v Stewart* (1870) IR 5 CL 27.

6 *Duvergier v Fellows* (1828) 5 Bing 248 at 265-266 (affd on other grounds (1830) 10 B & C 826; on appeal (1832) 1 Cl & Fin 39, HL); Com Dig, Condition (K 2).

7 *Barkworth v Young* (1856) 4 Drew 1 at 25. See further *Anon* (1697) 1 Salk 170.

8 *Bigland v Skelton* (1810) 12 East 436; and cf *Beswick v Swindells* (1835) 5 Nev & MKB 378, Ex Ch.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(3) ASSIGNMENT/124. Legal or equitable assignment.

### **(3) ASSIGNMENT**

#### **124. Legal or equitable assignment.**

The obligation created by a bond is a legal chose or thing in action<sup>1</sup>, and hence any absolute assignment of the bond, which does not purport to be by way of charge only, will, if express notice in writing is given to the obligor, be effectual<sup>2</sup>, as from the date of the notice, to transfer to the assignee the legal right and remedies under the bond as well as the power to give a good discharge, without the concurrence of the assignor<sup>3</sup>.

In equity the benefit of the obligation may be assigned by an oral agreement for valuable consideration, subject to all equities which exist at the time notice of the assignment is given to the obligor<sup>4</sup>.

1 As to choses or things in action see CHOSSES IN ACTION vol 13 (2009) PARA 1 et seq.

2 In subject to all equities which would have been entitled to priority over the right of the assignor: see *Graham v Johnson* (1869) LR 8 Eq 36 (where, the obligor being entitled, as against the obligee, to cancellation of the bond, it was held that an assignee for valuable consideration was in no better position and could not enforce the bond as against the obligor); *Payne v Mortimer* (1859) 4 De G & J 447. See also *Glasse v Marshall* (1845) 15 Sim 71; *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 611 per Blackburn J; *Re Cork and Youghal Rly Co* (1869) 4 Ch App 748 at 760 per Lord Hatherley.

3 See the Law of Property Act 1925 s 136(1); and CHOSSES IN ACTION vol 13 (2009) PARA 72. As to the transfer of bonds under the Companies Clauses Consolidation Act 1845 s 46 see *Vertue v East Anglian Rlys Co* (1850) 5 Exch 280; and COMPANIES vol 15 (2009) PARA 1751. Special provision is made as to the assignment, after breach, of bonds given under or for the purposes of any order of the High Court or Court of Appeal: see PARA 102 ante.

4 As to assignments generally, including equitable assignments, see CHOSSES IN ACTION vol 13 (2009) PARA 14 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(3) ASSIGNMENT/125. Estoppel as against assignee.

**125. Estoppel as against assignee.**

Although, as a general rule, the assignee of a bond takes subject to all equities<sup>1</sup>, and acquires no better right than the assignor, the obligor may be estopped by his conduct<sup>2</sup> from denying the validity of the bond as against an assignee for value without notice, or from setting up other defences which would have been available against the assignor<sup>3</sup>.

1 See CHOSER IN ACTION vol 13 (2009) PARA 60 et seq.

2 As to estoppel by conduct see ESTOPPEL vol 16(2) (Reissue) PARAS 957, 1052 et seq.

3 *Re South Essex Estuary Co, ex p Chorley* (1870) LR 11 Eq 157; *Re Hercules Insurance Co, Brunton's Claim* (1874) LR 19 Eq 302 (cases where companies were estopped from denying the validity of bonds, given by them, in the hands of assignees for value without notice); *Dickson v Swansea Vale Rly Co* (1868) LR 4 QB 44. See also *Hawker v Hallewell* (1856) 25 LJ Ch 558.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(i) Remedies/126. Payment of the amount of the obligation with relief against penalty.

## **(4) ENFORCEMENT**

### **(i) Remedies**

#### **126. Payment of the amount of the obligation with relief against penalty.**

Where a bond to secure payment of money provides for the payment of a larger sum on default in payment of the debt, equitable relief will be granted against payment of any penalty that would be involved in paying the larger sum<sup>1</sup>. Equitable relief against the consequences of breaches of conditions of bonds is not confined to common money bonds<sup>2</sup>, but will not be granted where the damages exceed the penalty<sup>3</sup> or where the amount claimed is not a penalty<sup>4</sup>. Equitable relief may be granted upon such terms as will secure justice, as for example the replacement by the debtor of a sum of stock which he has borrowed<sup>5</sup>. The equitable doctrine recognised that the true intent of a penal element in a money bond was to secure payment of principal and interest on the day fixed and also of interest thereafter until actual payment<sup>6</sup>. Relief will only be granted, therefore, on such terms as secure the fulfilment of this intention.

Relief will extend to post obit bonds<sup>7</sup>.

Where a bond is conditioned for the payment of a sum of money by stated instalments, and it is provided that in default of payment of any one instalment the whole sum remaining unpaid is to become payable, the acceleration of the payment of the remaining instalments is not a penalty, and on default in respect of any instalment the entire sum may be claimed<sup>8</sup>.

If a creditor agrees to accept part payment of a debt in full discharge, and takes a bond for payment of the full amount conditioned to be void on part payment, whether in one sum or by instalments, the full amount of the debt can be claimed in the event of a breach of the condition, though only in respect of one instalment, the amount in the obligatory part not being a penalty, but the sum actually due<sup>9</sup>.

If a bond is conditioned for the payment of a principal sum at a future day, and interest at stated periods in the meantime, the principal to become payable immediately in default of the regular payment of interest, the acceleration in the time for payment of the principal is not in the nature of a penalty, and on a breach in respect of the payment of interest the whole sum due for principal and interest may be recovered<sup>10</sup>.

The doctrine of penalties, which operates by striking down the penalty and enforcing the condition, does not apply to a simple or single bond<sup>11</sup>.

<sup>1</sup> *Friend v Burgh* (1679) Cas temp Finch 437; *Buckler v Ash* (1735) Lee temp Hard 124; *Forward v Duffield* (1747) 3 Atk 555; *Codd v Wooden* (1790) 3 Bro CC 73. See also *Peachy v Duke of Somerset* (1721) 1 Stra 447; *Preston v Dania* (1872) LR 8 Exch 19 at 21; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592 at 596, CA, per Bramwell LJ. After it had become established that relief would be granted by courts of equity, provision was made by the Administration of Justice Act 1705 for obtaining, in effect, similar relief in the common law courts, without recourse to a court of equity. The Administration of Justice Act 1705 ss 12, 13 (both repealed) followed and confirmed the equitable doctrine and limited accordingly the amount recoverable at common law (see *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA). The provisions had been repealable by rules of court for many years (see the Supreme Court of Judicature (Consolidation) Act 1925 s 99(1)(f), (g), Sch 1 (now repealed)) and their ultimate repeal by a Statute Law Revision Act cannot have been intended to effect any change of the law. At the present time, courts will grant relief by reason of the rules of equity, which prevail over the common law: see the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s

49; and CIVIL PROCEDURE; EQUITY vol 16(2) (Reissue) PARAS 498-500. The effect of the Administration of Justice Act 1705 s 12 (as originally enacted) was that in the case of a money bond with a penalty no sum could be recovered in excess of the principal and interest payable according to the condition (*England v Watson* (1842) 9 M & W 333), but now the obligor can claim relief in equity, and this may be granted to him subject, in a proper case, to any equitable terms that may be imposed.

The Administration of Justice Act 1705 s 13 (as originally enacted) enabled a defendant in an action on a common money bond to bring into court the principal and interest and costs, and thereby to satisfy his obligation. In so far as this enactment related to payment into court, as distinct from relief against a penalty, it was superseded by RSC Ord 22 rr 1-3 (see now CPR Pt 36), before it was repealed.

2 *Sloman v Walter* (1783) 1 Bro CC 418. The Administration of Justice Act 1696 s 8 (repealed) gave similar relief to the equitable doctrine in the common law courts in respect of double bonds other than common money bonds (relief in common law courts in respect of the latter was given under the Administration of Justice Act 1705: see note 1 supra). The Administration of Justice Act 1696 s 8 (as originally enacted) required the plaintiff to assign breaches of the conditions of the bond and the jury to assess not only the damages at common law (without equitable or statutory relief) under the terms of the obligation but also damages for the proved breaches of the condition. It then provided that judgment should be entered for the former damages, ie the amount of the penalty in the obligation of the bond (without relief), but that execution should issue only for the damages assessed for the proved breaches, the judgment for the penalty remaining as security against any further breaches. On the occurrence of a further breach, the plaintiff was, under the provisions of the Act, entitled to have a writ of scire facias, suggesting the further breaches, and calling on the defendant to show cause why execution should not issue for the damages arising from them, such damages to be ascertained by a writ of inquiry: see *Judd v Evans* (1795) 6 Term Rep 399; *Preston v Dania* (1872) LR 8 Exch 19. After the fusion of the administration of law and equity by the Judicature Act 1873, there was no real need for the statutory relief, but the special procedure established by the Administration of Justice Act 1696 was thought to have advantages and s 8 (as originally enacted) was therefore kept in force. It was repealable by rules of court (see the Supreme Court of Judicature (Consolidation) Act 1925 s 99(1)(f), (g), Sch 1 (now repealed)); and the former RSC Ord 53G r 1(1) (added by the Rules of the Supreme Court (No 1) 1957, SI 1957/1178, r 7; but now revoked) provided that the procedure prescribed by the Administration of Justice Act 1696 s 8 (as originally enacted) and the Civil Procedure Act 1833 ss 16, 18 (as originally enacted) should no longer be followed and those provisions were repealed. The former RSC Ord 53G r 1(2) (as so added; but now revoked) provided that, in an action on a bond, the indorsement of the writ and the statement of claim should be framed so as to claim the amount which the plaintiff was entitled to recover, regard being had to the rules of equity relating to penalties, and not the penalty provided for by the bond. In the 1962 revision of the rules, RSC Ord 53G (as added) was wholly revoked and not replaced. The present position is therefore that there is no longer any statutory relief against a penalty in a bond, but the equitable rule as to penalties has effect and prevails over the common law (see the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 49) and will be applied without the need for the defendant to bring separate proceedings for relief. The procedure in claims on bonds is now the same as in other claims based on contractual claims: see further PARA 130 post.

3 *Davenport v Longueville* (1661) 1 Rep Ch 196.

4 *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA (loan payable by instalments including interest, expenses and life assurance).

5 *Vaughan v Wood* (1833) 1 My & K 403; and cf *Orchard v Ireland* (1704) 2 Ld Raym 1033 (defendant not required to waive defence of statute of limitation to a simple contract claim also made against him by the plaintiff).

6 *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561 at 578, CA, per Rigby LJ.

7 These bonds were within the Administration of Justice Act 1705 s 12 (repealed) (see note 1 supra), when the money became payable: *Smith v Bond* (1833) 10 Bing 125.

8 *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592, CA; *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL.

9 *Re Neil, ex p Burden* (1881) 16 ChD 675, CA; *Thompson v Hudson* (1869) LR 4 HL 1.

10 *Goad v Empire Printing and Publishing Co Ltd* (1888) 52 JP 438.

11 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA. For the meaning of 'single bond' see PARA 90 ante.

## UPDATE

### 126 Payment of the amount of the obligation with relief against penalty

NOTES 1, 2--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(i) Remedies/127. Distinction between penalty and liquidated damages.

**127. Distinction between penalty and liquidated damages.**

Where a bond is conditioned for the performance of an act or acts other than the payment of money, the question whether the sum named in the obligatory part is to be deemed a penalty or liquidated damages depends on the circumstances of the particular case and the presumed intention of the parties<sup>1</sup>. Where it is in the nature of liquidated damages, the sum named in the obligatory part is recoverable on breach of the condition<sup>2</sup>. No equitable relief will be granted in such a case<sup>3</sup>.

1 See eg *Wallis v Smith* (1882) 21 ChD 243; *Willson v Love* [1896] 1 QB 626, CA; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA (bond in a sum conditioned on tenant's keeping premises in repair would constitute a penalty); and see further DAMAGES vol 12(1) (Reissue) PARA 1065 et seq ante.

2 *Strickland v Williams* [1899] 1 QB 382, CA.

3 See PARA 126 notes 2-3 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(i) Remedies/128. Amount recoverable limited to penalty and costs.

### **128. Amount recoverable limited to penalty and costs.**

The amount recoverable on a bond forfeited by breach of the condition is in all cases limited, both at law and in equity, to the amount of the penalty fixed by the obligatory part, with costs, even where the principal and interest payable according to the condition, or the damages sustained by the breach, exceed that sum<sup>1</sup>. If, however, a judgment is recovered on the bond, it will carry interest until satisfied, though the amount of the judgment, with interest, may exceed the amount of the penalty<sup>2</sup>. Where interest has been paid as interest, and has been applied as such, the amount ultimately payable may exceed the amount of the penalty, provided the principal and interest payable at any one time never exceeds that amount<sup>3</sup>.

Where the sum named in the obligatory part is not a penalty, as in the case of a bond for a specified sum, conditioned for payment of the same sum with interest, the rule that the amount recoverable is limited to the sum named in the obligatory part does not apply<sup>4</sup>.

1 *Hatton v Harris* [1892] AC 547, HL; *Wilde v Clarkson* (1795) 6 Term Rep 303; *Clarke v Seton* (1801) 6 Ves 411; *Hughes v Wynne* (1832) 1 My & K 20; *Mackworth v Thomas* (1800) 5 Ves 329; *Brangwin v Perrot* (1778) 2 Wm Bl 1190; *White v Sealy* (1778) 1 Doug KB 49; *Shutt v Proctor* (1816) 2 Marsh 226. The rule that no more can be recovered than the penalty and costs is a general rule applicable to all bonds, and annuity bonds (*Butcher v Churchill* (1808) 14 Ves 567) and replevin bonds (*Branscombe v Scarborough*, *Branscombe v Heath* (1844) 6 QB 13; and see PARA 101 ante; and DISTRESS vol 13 (2007 Reissue) PARA 1081 et seq) are no exception to the rule. In *Grant v Grant* (1830) 3 Sim 340, a decree was made in equity for the full payment of principal and interest although it exceeded the penalty of the bond, on the ground that the obligor had prevented the obligee from recovering by vexatious proceedings, but such a case could hardly occur now. See also *Mathews v Keble* (1868) 3 Ch App 691. It seems that *Lord Lonsdale v Church* (1788) 2 Term Rep 388 must now be considered overruled.

2 *M'Clure v Dunkin* (1801) 1 East 436.

3 *Knipe v Blair* [1900] 1 IR 372.

4 *Francis v Wilson* (1824) Ry & M 105.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(i) Remedies/129. Injunction when agreement secured by bond.

**129. Injunction when agreement secured by bond.**

Where there is a covenant or agreement not to do a certain act, and a bond is given with a penalty conditioned to be forfeited on doing the act, the court will not refrain by reason of the giving of the bond from granting an injunction to restrain a breach of the covenant or agreement, unless it appears to have been the intention of the parties that the obligor should be entitled to do the act on condition of paying the penalty; prima facie, if a person agrees not to do a certain thing, and to pay a certain sum if he does do it, there are two independent agreements and he is not entitled to break one agreement on condition of his performing the other<sup>1</sup>.

<sup>1</sup> *French v Macale* (1842) 2 Dr & War 269; *Hardy v Martin* (1783) 1 Cox Eq Cas 26; *Clarkson v Edge* (1863) 33 Beav 227; *Gravelly v Barnard* (1874) LR 18 Eq 518; *Bird v Lake* (1863) 1 Hem & M 111; *Jones v Heavens* (1877) 4 ChD 636; *London and Yorkshire Bank Ltd v Pritt* (1887) 56 LJ Ch 987; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA. As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(ii) Procedure/130. Procedure for claims.

## **(ii) Procedure**

### **130. Procedure for claims.**

Claims to enforce bonds follow the ordinary procedural rules<sup>1</sup>.

<sup>1</sup> See the CPR; and CIVIL PROCEDURE.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(ii) Procedure/131. Where two or more obligees or obligors.

### **131. Where two or more obligees or obligors.**

In a claim on a bond given to two or more jointly, all the obligees should be joined as claimants<sup>1</sup>.

Where there are two or more obligors the effect of the Civil Liability (Contribution) Act 1978<sup>2</sup> is that whether the liability of two or more persons is joint or otherwise, the claimant may choose which of them he wishes to sue<sup>3</sup>. He need not join, nor can he be compelled to join, the other persons also liable to him even if their liability is under a joint bond only<sup>4</sup>.

1 *Hopkinson v Lee* (1845) 6 QB 964; *Keightley v Watson* (1849) 3 Exch 716; and see CPR 19.1(2), 19.2, 19.3. However, if the interest of the obligees is several, one may sue without the other or others: *Haddon v Ayers* (1858) 1 E & E 118; *Palmer v Mallet* (1887) 36 ChD 411, CA. See also PARA 116 ante. It should be noted that a bond made after 1925 with two or more jointly is to be construed as being also made with each of them if and so far as a contrary intention is not expressed in the bond and subject to its provisions: see the Law of Property Act 1925 s 81 (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1, Sch 1 para 5). In its application to instruments made after 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 ante), the Law of Property Act 1925 s 81 (as amended) is modified: see s 81(5) (as added); para 264 post; and CONTRACT vol 9(1) (Reissue) PARAS 1081-1082.

2 As to proceedings against persons jointly liable for the same debt or damage see the Civil Liability (Contribution) Act 1978 s 3; and DAMAGES vol 12(1) (Reissue) PARA 838.

3 See *ibid* s 1(1); and DAMAGES vol 12(1) (Reissue) PARA 839.

4 See note 2 *supra*. As to successive actions against persons liable for the same damage see *ibid* s 4. As to the addition and substitution of parties see CPR 19.1(2), 19.2, 19.3. As to entitlement to contribution see the Civil Liability (Contribution) Act 1978 s 1; and DAMAGES vol 12(1) (Reissue) PARA 839. If the defendant desires to obtain a contribution from the other joint obligors he may do so by making his claim under the Civil Liability (Contribution) Act 1978, but this is of no concern to the claimant: see DAMAGES vol 12(1) (Reissue) PARA 837 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(ii) Procedure/132. Claim on lost bond.

**132. Claim on lost bond.**

A claim may be brought on a lost bond, and the obligation enforced, subject to a proper indemnity being given to the defendant to the satisfaction of the court<sup>1</sup>.

<sup>1</sup> See *Atkinson v Leonard* (1791) 3 Bro CC 218; *East India Co v Boddam* (1804) 9 Ves 464.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(iii) Limitation of Action/133. Period of limitation.

### **(iii) Limitation of Action**

#### **133. Period of limitation.**

The remedy by action on a bond is barred after 12 years from the accrual of the right of action<sup>1</sup>; but the period may be longer in cases where there is or has been disability, or there has been acknowledgment or part payment, fraud or mistake<sup>2</sup>.

1 See the Limitation Act 1980 s 8; and LIMITATION PERIODS vol 68 (2008) PARA 975.

2 See LIMITATION PERIODS vol 68 (008) PARA 1181 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(iii) Limitation of Action/134. When time begins to run.

**134. When time begins to run.**

In the case of a conditional bond, time does not begin to run for the purposes of limitation of actions<sup>1</sup> until breach of the condition<sup>2</sup>; and where the condition is for payment of an annuity or of a principal sum by instalments, or interest at stated times, or for the performance of several acts in succession, a new cause of action arises on each successive breach, unless it is provided that the whole sum is to become due on default in payment of interest or of any one instalment, as the case may be; and a claim may be brought in respect of such of the sums as accrued due, or such of the acts as ought to have been performed, within the 12 years preceding the commencement of the proceedings, though more than 12 years may have elapsed since the first or any other breach of the condition<sup>3</sup>.

1 See the Limitation Act 1980 s 8; and LIMITATION PERIODS vol 68 (2008) PARA 975.

2 *Sanders v Coward* (1845) 15 M & W 48; *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA.

3 *Amott v Holden* (1852) 18 QB 593; *Blair v Ormond* (1851) 17 QB 423; *Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA; *Amos v Smith* (1862) 1 H & C 238.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(4) ENFORCEMENT/(iii) Limitation of Action/135. Conflict of laws.

**135. Conflict of laws.**

Where a claim is brought in England on a bond executed abroad, the question whether or not the remedy is barred by lapse of time is governed by the English statute<sup>1</sup>, and not the law of the place where the bond was executed<sup>2</sup>.

1     I.e. the Limitation Act 1980: see LIMITATION PERIODS.

2     *Alliance Bank of Simla v Carey* (1880) 5 CPD 429. See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 26.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(5) DISCHARGE/136. Modes of discharge.

## (5) DISCHARGE

### 136. Modes of discharge.

The obligation of a bond may be discharged in any one of the following ways:

- 10 (1) By due performance of the condition, or, in certain cases, by its performance becoming impossible<sup>1</sup>.
- 11 (2) By accord and satisfaction. Since the Judicature Acts an accord and satisfaction, though by parol, and whether before or after breach, may be pleaded to a claim on a bond<sup>2</sup>.
- 12 (3) By release or covenant not to sue<sup>3</sup>.
- 13 (4) By cancellation, by or with the consent of the obligee, with the intention to cancel the bond<sup>4</sup>. However, a cancellation by the obligor or a stranger without the consent of the obligee, or a cancellation by mistake or accident, without the intention of cancelling, will not affect the obligation<sup>5</sup>. Production, however, of a bond in a cancelled state is prima facie evidence that it is void through cancellation by or with the consent of the obligee<sup>6</sup>.
- 14 (5) By a material alteration by the obligee after execution<sup>7</sup>. An immaterial alteration will not affect the validity of the bond<sup>8</sup>; nor will an alteration by the obligor, because a person is not permitted to take advantage of his own wrong<sup>9</sup>. Alterations made before the bond is completely executed, with the assent of all the parties, do not affect its validity<sup>10</sup>; and blanks may be filled up, even after execution, by consent of all the parties<sup>11</sup>. However, if, after a bond is executed by some only of several obligors, a material alteration is made without their consent, they are discharged<sup>12</sup>.

Moreover, since in equity relief will be granted against a penalty, such as the penal payment required by a common money bond on failure to comply with the condition of the bond, the obligation of the bond is in effect discharged by the payment by the obligor of all that the court would require him to pay<sup>13</sup>.

1 See PARA 123 ante.

2 *Steeds v Steeds*(1889) 22 QBD 537. See further CONTRACT vol 9(1) (Reissue) PARAS 1052-1054.

3 See CONTRACT vol 9(1) (Reissue) PARAS 1052-1054; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1218 et seq. See also *Major v Major* (1852) 1 Drew 165; *Shore v Shore* (1847) 2 Ph 378; *Hodges v Smith* (1598) Cro Eliz 623. However, an intention to release is not sufficient: *Jorden v Money* (1854) 5 HL Cas 185; *Re Holmes' Estate, Woodward v Humpage, Inskip's Case* (1861) 3 Giff 352. As to the effect of appointing the obligor executor of the obligee's will see PARA 138 post.

4 *Seaton v Henson* (1678) 2 Lev 220. See PARAS 76-77 ante. See further CONTRACT vol 9(1) (Reissue) PARAS 1059-1060.

5 *Re Smith, ex p Smith* (1843) 3 Mont D & De G 378; *Raper v Birkbeck* (1812) 15 East 17; *Wilkinson v Johnson* (1824) 3 B & C 428; *Bolton v Bishop of Carlisle* (1793) 2 Hy Bl 259; *Vanhoven v Giesque* (1706) 4 Bro Parl Cas 622.

6 *Alsager v Close* (1842) 10 M & W 576; *Meiklejohn v Campbell* (1940) 56 TLR 663 (affd 56 TLR 704, CA); and cf *Re Dixon, Heynes v Dixon*[1900] 2 Ch 561, CA.



7 *Pigot's Case* (1614) 11 Co Rep 26b. See further *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd*[2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA; and PARA 81 et seq ante.

8 *Shep Touch* 69; *Waugh v Bussell* (1814) 5 Taunt 707.

9 *Shep Touch* 69.

10 *Zouch v Clay* (1671) 1 Vent 185; *Matson v Booth* (1816) 5 M & S 223.

11 *Hudson v Revett* (1829) 2 Moo & P 663 at 692; *Texira v Evans* (1788-1794) cited in 1 Anst 228 at 229.

12 In *Ellesmere Brewery Co v Cooper*[1896] 1 QB 75, a bond by the terms of which four sureties jointly and severally bound themselves, the liability of two of them being limited to £50 each, and of the other two to £25 each, was executed by three of them, the fourth, whose liability was limited to £50, then executed it, adding to his signature '£25 only'; and the obligee accepted the bond so executed without objection. It was held that the first three signatories were discharged by the alteration, and that the fourth was also discharged, because he had executed it as a joint and several, and not as a several, bond.

13 See PARA 126 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(5) DISCHARGE/137. Where two or more obligees.

### **137. Where two or more obligees.**

A bond given to two or more obligees jointly<sup>1</sup> may be discharged by a payment to<sup>2</sup>, or accord and satisfaction with<sup>3</sup>, any one of them; and, in the absence of fraud<sup>4</sup>, a release by one constitutes a good defence against them all<sup>5</sup>, though it is otherwise in the case of a covenant not to sue<sup>6</sup>. In the case of fraud, a release given by one of several joint obligees will in equity be ordered to be delivered up to be cancelled<sup>7</sup>. Where the interests of the obligees are several, a bond, though joint in form, will be construed as a several bond<sup>8</sup>, in which case an accord and satisfaction with, or release by, one or more, will not affect rights of the others<sup>9</sup>. However, in the case of bonds executed after 31 December 1881, if the money is expressed to be owing to two or more on a joint account, it is deemed to remain money belonging to them on joint account as between them and the obligor, and the receipt in writing of the survivors or last survivor, or of the personal representatives of the last survivor, is, unless a contrary intention is expressed in the bond, a good discharge, notwithstanding notice of severance of the joint account<sup>10</sup>.

1 If the bond is made after 1925 it will be construed as being several as well as joint unless a contrary intention is expressed: see the Law of Property Act 1925 s 81(1). In its application to instruments made after 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 ante), the Law of Property Act 1925 s 81(1) is modified: see s 81(5) (as added); para 264 post; and CONTRACT vol 9(1) (Reissue) PARAS 1081-1082. See also PARA 116 ante.

2 *Powell v Brodhurst* [1901] 2 Ch 160; *Husband v Davis* (1851) 10 CB 645.

3 *Wallace v Kelsall* (1840) 7 M & W 264; and cf *Steeds v Steeds* (1889) 22 QBD 537.

4 *Barker v Richardson* (1827) 1 Y & J 362.

5 *Wallace v Kelsall* (1840) 7 M & W 264; *Wilkinson v Lindo* (1840) 7 M & W 81; *Wild v Williams* (1840) 6 M & W 490; *Jones v Herbert* (1817) 7 Taunt 421.

6 *Walmesley v Cooper* (1839) 11 Ad & El 216.

7 *Barker v Richardson* (1827) 1 Y & J 362.

8 *Haddon v Ayers* (1858) 1 E & E 118; *Withers v Bircham* (1824) 3 B & C 254; *Palmer v Sparshott* (1842) 4 Man & G 137.

9 *Steeds v Steeds* (1889) 22 QBD 537; explained in *Powell v Brodhurst* [1901] 2 Ch 160. As to cancellation see *Re Smith, ex p Smith* (1843) 3 Mont D & De G 378; and PARA 76 et seq ante. As to discharge see PARA 80 ante.

10 See the Law of Property Act 1925 s 111; and MORTGAGE vol 77 (2010) PARA 212.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/2. BONDS/(5) DISCHARGE/138. Where two or more obligors.

### **138. Where two or more obligors.**

A release of one of two or more obligors jointly, and not severally, bound, operates as a release of all in equity as well as at law<sup>1</sup>. The same rule applies in the case of a joint and several bond if the release is an absolute and formal release<sup>2</sup>; but if it purports to be a release of the particular obligor only, or expressly reserves the right to sue the others, it will not operate to discharge them, unless their right of contribution is taken away or injuriously affected by the release<sup>3</sup>.

The appointment, by the obligee of a joint and several bond, of one of two or more obligors to be the executor of his will operates on the death of the obligee as a release of all the obligors<sup>4</sup>.

A covenant not to sue one or some of two or more joint, or joint and several, obligors, does not operate to discharge the other or others<sup>5</sup>.

In the case of a bond under seal<sup>6</sup>, if the seal of one of two or more obligors bound jointly, or jointly and severally, is torn off, by or with the consent of the obligee, and with the intention to cancel the bond, it is discharged as regards them all<sup>7</sup>; but where they are bound severally only, the destruction of the seal of one or some of them does not affect the liability of the others<sup>8</sup>.

1 *North v Wakefield* (1849) 13 QB 536; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177 at 188, CA.

2 *North v Wakefield* (1849) 13 QB 536; *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541; *Bower v Swadlin* (1738) 1 Atk 294.

3 *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC. See further PARA 80 ante.

4 *Cheetham v Ward* (1797) 1 Bos & P 630; and see *Re Bourne, Davey v Bourne* [1906] 1 Ch 697 at 703, CA. At common law the debt is discharged by release at the date of the death of the testator; in equity it is discharged at the date of the probate because the debt is deemed to have been paid by the debtor to himself as executor: *Jenkins v Jenkins* [1928] 2 KB 501. As to the obligation of the executor to account, although the debt is extinguished, see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 21.

5 *Hutton v Eyre* (1815) 6 Taunt 289; *Dean v Newhall* (1799) 8 Term Rep 168; *Lacy v Kinnaston* (1701) 12 Mod Rep 548 at 551.

6 As from 31 July 1990, any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b); and PARAS 7, 27, 32 ante. As to the application of s 1(1)(b) see s 1(9); and PARA 7 ante. As to where a seal is still required see PARA 32 ante. See also PARA 78 ante.

7 *Seaton v Henson* (1678) 2 Lev 220; *Bayly v Garforth* (1641) March 125; *Collins v Prosser* (1823) 1 B & C 682.

8 *Collins v Prosser* (1823) 1 B & C 682. See further PARA 78 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND/139. Definition of instrument under hand only.

### **3. INSTRUMENTS UNDER HAND ONLY**

#### **(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND**

##### **139. Definition of instrument under hand only.**

An instrument under hand only is a document in writing which either creates or affects legal or equitable rights or liabilities, and which is authenticated by the signature of the author, but is not executed by him as a deed<sup>1</sup>. Such documents are used in a great variety of transactions, including contracts, assignments, acknowledgments of title, and notices. The expression is not limited to documents of a formal character, and it extends to any duly signed document which is intended by the author to be the means of producing a result recognised in law<sup>2</sup>.

1 See eg *Chadwick v Clarke* (1845) 1 CB 700 at 707-708. 'Writing' includes printing and other forms of reproducing words: see PARAS 155-156 post. See also *Trustees Solutions Ltd v Dubery* [2006] EWHC 1426 (Ch), [2006] All ER (D) 233 (Jun), (2006) Times, 7 August (where amendment to a pension scheme to be made 'by any writing effected under hand' was said to require the amendment to have been made in writing and signed).

2 *Powell v Ely* (1980) Times, 22 May, DC (where it was held that a divorce petition and a statement of arrangements were instruments relating to legal proceedings within the Solicitors Act 1974 s 22(1)(b) (see LEGAL PROFESSIONS VOL 65 (2008) PARA 595)).

#### **UPDATE**

##### **139 Definition of instrument under hand only**

NOTE 1--*Trustees Solutions Ltd*, cited, reported at [2007] ICR 412.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND/140. Meaning of instrument.

#### **140. Meaning of instrument.**

The word 'instrument' as applied to a writing may have a still wider scope, and may include documents which affect the pecuniary position of parties although they do not create rights or liabilities recognised in law; but usually it applies to a document under which some right or liability, whether legal or equitable, exists<sup>1</sup>.

The phrase 'deed, will, or instrument in writing'<sup>2</sup> has been held to include the printed rules of a savings bank<sup>3</sup>. A power to appoint by 'deed, instrument or will' includes a power to appoint by an instrument under hand<sup>4</sup>. In connection with stamp duties, 'instrument' includes every written document<sup>5</sup>, and thus includes an agreement in writing not being a deed securing periodical payments<sup>6</sup>.

It has been defined for the purposes of particular statutes as including an Act of Parliament, unless the context otherwise requires<sup>7</sup>, and also as not including a statute unless the statute creates a settlement<sup>8</sup>.

In general the word is not appropriate to describe an order of the court<sup>9</sup>.

A letter or a telegram may constitute a forged<sup>10</sup> instrument<sup>11</sup>.

1 *Mason v Schuppsisser* (1899) 81 LT 147 (construction of the phrase 'deed, will or other written instrument' in RSC Ord 54A r 1 (revoked)); and cf *Taylor v Holt* (1864) 3 H & C 452; *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL (cases under the Civil Procedure Act 1833 s 28 (repealed: see now the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 35A (as added); and DAMAGES vol 12(1) (Reissue) PARA 848; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307); construction of words regarding interest on a debt payable 'by virtue of some written instrument').

2 See the Larceny Act 1916 s 46(1) (repealed).

3 *R v Fletcher* (1862) 31 LJMC 206, CCR.

4 *Brodrick v Brown* (1855) 1 K & J 328.

5 Stamp Duties Management Act 1891 s 27; Stamp Act 1891 s 122(1).

6 See *National Telephone Co Ltd v IRC* [1899] 1 QB 250, CA; affd [1900] AC 1, HL ('bond, covenant or instrument of any kind whatsoever').

7 Trustee Act 1925 s 68(1) PARA 5.

8 Law of Property Act 1925 s 205(1)(viii); Settled Land Act 1925 s 117(1)(viii); Land Registration Act 2002 s 89; and see LAND REGISTRATION vol 26 (2004 Reissue) PARA 893.

9 *Jodrell v Jodrell* (1869) LR 7 Eq 461. However, see *Re Holt's Settlement*, *Wilson v Holt* [1969] 1 Ch 100, [1968] 1 All ER 470; *Sun Alliance Insurance Ltd v IRC* [1972] Ch 133, [1971] 1 All ER 135.

10 Ie within the Forgery and Counterfeiting Act 1981 ss 1, 8 (as amended): see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 346 et seq.

11 See *R v Riley* [1896] 1 QB 309, CCR; *R v Howse* (1912) 107 LT 239; *R v Cade* [1914] 2 KB 209, CCA.

#### **UPDATE**

#### **140 Meaning of instrument**

NOTE 1--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND/141. Effect.

#### **141. Effect.**

The effect of an instrument under hand varies according to the transaction for which it is used. If it is concerned with a contract, it may either contain the contract itself or be a memorandum or particulars of a contract previously entered into<sup>1</sup>. In either case the contract is not enforceable unless it is founded on valuable consideration<sup>2</sup>. If the contract has been reduced into writing it supersedes any prior verbal negotiations, and binds the parties to the performance of the terms expressed therein<sup>3</sup>. If the writing does not itself constitute the contract but is only a memorandum, signed or adopted by all the parties, of a contract previously made, it will in general supersede the previous contract and so produce the same effect as a written contract, as regards the enforcement of the written terms to the exclusion of the parol terms, unless it can be shown that a parol term not included in the written terms was not intended by the parties to cease to form part of their agreement but was intended to continue in force with the written terms<sup>4</sup>. Such a memorandum may be made at a time subsequent to the contract<sup>5</sup>. Where a memorandum signed by the party to be charged or his agent is required to satisfy the Statute of Frauds<sup>6</sup>, it must be made before a claim is brought<sup>7</sup>.

1 Under the Statute of Frauds (1677) s 4 (as amended) (replaced as regards contracts for the sale of land by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARAS 11 ante, 145, 156 post (see SALE OF LAND vol 42 (Reissue) PARAS 29-40); and repealed as to other contracts, except promises to answer for the debt etc of another, by the Law Reform (Enforcement of Contracts) Act 1954 s 1 (repealed)), either the agreement or a memorandum or note of it must be in writing. The Employment Rights Act 1996 s 1 provides that where an employee begins employment with an employer, the employer must give to the employee a written statement of particulars of employment: see s 1(1); and see EMPLOYMENT vol 39 (2009) PARA 93 et seq.

2 See PARA 59 note 1 ante; and CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

3 *Leggott v Barrett* (1880) 15 ChD 306 at 311, CA; and see PARA 185 post.

4 See PARA 190 post.

5 *Sievwright v Archibald* (1851) 17 QB 103 at 107; *Bailey v Sweeting* (1861) 9 CBNS 843 at 857; and see *Roberts v Tucker* (1849) 3 Exch 632 at 641.

6 See the Statute of Frauds (1677); and note 1 supra.

7 *Lucas v Dixon* (1889) 22 QBD 357, CA.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND/142. Assignment.

**142. Assignment.**

If the writing purports to be an assignment, and having regard to its subject matter is capable of operating as such, it will be effectual to pass the property in the subject matter in accordance with the intention expressed by the assignor, whether it is made with or without valuable consideration<sup>1</sup>. If the writing purports to declare a trust with respect to property belonging to the author, either at law and in equity, or in equity alone, the trust is well created, although there is no consideration<sup>2</sup>.

1 Where writing under hand only is effective at law as an assignment, the absence of consideration is immaterial (eg in the case of shares which, under the articles of the company or the Stock Transfer Act 1963, are transferable by writing not being a deed, though such an assignment may require some further formality, such as registration, to give the assignee the full benefit of it: see COMPANIES vol 14 (2009) PARAS 399, 403). Similarly an equitable interest can be assigned by writing under hand without consideration: see PARAS 24-25 ante. A chose or thing in action may also be so assigned: see CHOSSES IN ACTION vol 13 (2009) PARAS 33-35.

2 As to the nature and creation of trusts see TRUSTS vol 48 (2007 Reissue) PARAS 601-753.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(1) DEFINITION AND EFFECT OF AN INSTRUMENT UNDER HAND/143. Acknowledgment, notice etc.

### **143. Acknowledgment, notice etc.**

If the writing amounts to an acknowledgment of title to land or to money charged on land, or of a specialty or a simple contract debt, it operates to give a new starting point for the running of the Limitation Act 1980<sup>1</sup>. Other instruments under hand, such as demands, notices, and consents, operate according to their tenor, provided that no further formality is required in the particular case.

As regards all such instruments, whether purporting to operate by way of contract, assignment, or otherwise, it is open to the party against whom the instrument is set up to show that it ought not to bind him on the ground that he was under some disability which made his effective participation in the transaction impossible, or that there were circumstances of fraud, misrepresentation, duress, or mistake which entitle him to treat the document as either void or voidable<sup>2</sup>.

<sup>1</sup> See the Limitation Act 1980 ss 29-31; and LIMITATION PERIODS vol 68 (2008) PARA 1181 et seq. A balance sheet is capable of containing or amounting to an acknowledgment in writing: *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700 at 704, [1949] 2 All ER 198 at 201, CA, per Lord Goddard CJ; *Re Gee & Co (Woolwich) Ltd* [1975] Ch 52, [1974] 1 All ER 1149.

<sup>2</sup> See PARAS 67 et seq, 87 note 11 ante; and CONTRACT vol 9(1) (Reissue) PARAS 630, 687, 701 et seq, 895-896; EQUITY vol 16(2) (Reissue) PARA 412 et seq; MISREPRESENTATION AND FRAUD; MISTAKE.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/144. When necessary.

## **(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY**

### **144. When necessary.**

An instrument required by the common law to be in writing must be executed as a deed<sup>1</sup>; hence at law the requirement of writing under hand only must be looked for in the statutes<sup>2</sup>, or in the direction or agreement of the parties<sup>3</sup>. Transactions which at law require a deed are, in general, good in equity, although effected only by writing under hand, provided they are founded on valuable consideration<sup>4</sup>. If voluntary, they are in practice always made by deed, though if the transaction is the assignment of an equitable interest, writing under hand only is in general sufficient<sup>5</sup>. Statutory requirements, and such as are imposed by the parties, are recognised in equity as well as at law<sup>6</sup>. The requirement of writing is very general, and, apart from statute, convenience requires that most matters should be put into writing.

1 See PARA 10 ante.

2 As to contracts which are required by statute to be in writing or evidenced in writing see CONTRACT vol 9(1) (Reissue) PARAS 623-628.

3 As to where, for instance, an appointment is required to be made, or a consent given, in writing see PARA 146 post.

4 See PARA 25 ante.

5 See PARAS 25 ante, 148 post.

6 Eg where an appointment is required to be made by deed.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/145. Contracts for the sale of land.

#### **145. Contracts for the sale of land.**

A contract for the sale or other disposition<sup>1</sup> of an interest in land<sup>2</sup> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each document<sup>3</sup>. This includes the variation of a contract within the Law of Property (Miscellaneous Provisions) Act 1989<sup>4</sup>, and an agreement made pursuant to the Town and Country Planning Act 1990<sup>5</sup>. The terms may be incorporated in a document either by being set out in it or by reference to some other document<sup>6</sup>.

These provisions<sup>7</sup> do not apply in relation to a contract to grant a short lease<sup>8</sup>, a contract made in the course of a public auction<sup>9</sup>, or a contract regulated under the Financial Services and Markets Act 2000 other than a regulated mortgage contract<sup>10</sup>; nor do they affect the creation or operation of resulting, implied or constructive trusts<sup>11</sup>. Nor are contracts of disposition, as distinct from executory contracts for disposition, caught by these provisions<sup>12</sup>.

1 For the meaning of 'disposition' see PARA 34 note 6 ante; definition applied by the Law of Property (Miscellaneous Provisions) Act 1989 s 2(6).

2 For the meaning of 'interest in land' see PARA 34 note 7 ante; definition applied by *ibid* s 2(6) (amended the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 Law of Property (Miscellaneous Provisions) Act 1989 s 2(1). Nothing in s 2 (as amended) applies in relation to contracts made before 27 September 1989: s 2(7). Section 2 (as amended) supersedes the Law of Property Act 1925 s 40 (repealed): see the Law of Property (Miscellaneous Provisions) Act 1989 s 2(8). See further SALE OF LAND vol 42 (Reissue) PARAS 29-40. As to electronic conveyancing see PARA 9 ante; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1049 et seq.

4 *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA.

5 *Jelson Ltd v Derby City Council* [1999] 3 EGLR 91, [1999] 39 EG 149. However, this case was doubted in *Nweze v Nwoko* [2004] EWCA Civ 379, [2004] 2 P & CR D2.

6 Law of Property (Miscellaneous Provisions) Act 1989 s 2(2); and see SALE OF LAND vol 42 (Reissue) PARA 29.

7 *le ibid* s 2 (as amended): see SALE OF LAND vol 42 (Reissue) PARA 29.

8 *le* such a lease as is mentioned in the Law of Property Act 1925 s 54(2): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 101-102.

9 As to public auction see AUCTION vol 2(3) (Reissue) PARA 201 et seq.

10 As to activities regulated under the Financial Services and Markets Act 2000 see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 80 et seq. As to regulated mortgage contracts see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 203 et seq. See also *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA.

11 Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 317(1), (2)). See also SALE OF LAND vol 42 (Reissue) PARA 29. Where a contract for the sale or other disposition of an interest in land satisfies the conditions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract comes into being, or is deemed to have come into being, at such time as may be specified in the order: s 2(4).

12 *Target Holdings Ltd v Priestley* (1999) 79 P & CR 305.

#### **UPDATE**

## **145 Contracts for the sale of land**

NOTE 11--Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) further amended:  
SI 2006/2383, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from  
30 June 2010 for remaining purposes).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/146. Appointments of property, and to offices.

#### **146. Appointments of property, and to offices.**

Appointments are either appointments of property, appointments of persons to offices or other positions, or appointments of trustees or agents. Appointments of property are frequently authorised to be made by instrument under hand, as well as by deed or will<sup>1</sup>. An appointment of a new trustee may usually be made in writing under hand, but must for certain purposes be made by deed<sup>2</sup>. An appointment of an agent need not in general be in writing, but sometimes this is expressly required<sup>3</sup>. The appointment of a proxy in company and bankruptcy matters<sup>4</sup>, and an application for the appointment of a proxy to vote at an election<sup>5</sup>, must be in writing. There are certain requirements for instruments to be in writing in regard to the registration, certification and transfer of British government stock<sup>6</sup>.

1 See PARA 140 note 4 ante.

2 See PARA 18 ante.

3 *Coles v Trecothick* (1804) 9 Ves 234 at 250; and see AGENCY vol 1 (2008) PARAS 15, 19. An instrument creating a power of attorney must be executed as a deed by the donor of the power: Powers of Attorney Act 1971 s 1(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1, Sch 1 para 6); and see PARAS 13, 34, 47 ante. In certain cases an authority in writing is necessary to enable an agent to sign an instrument: see PARA 157 post.

4 As to the appointment of a proxy in company insolvency matters see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 657-661. As to the appointment of a proxy in bankruptcy matters see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 278 et seq.

5 See eg the Representation of the People Act 2000 s 12, Sch 4 (as amended); the Representation of the People (England and Wales) Regulations 2001, SI 2001/341, Pt IV (regs 50-63A) (as amended); and ELECTIONS vol 15(4) (2007 Reissue) PARA 372 et seq.

6 See the Government Stock Regulations 2004, SI 2004/1611, Pt 3 (regs 7-35); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1335 et seq.

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**147. Declarations of trusts.**

All declarations of trust respecting any land<sup>1</sup> or any interest in land must be evidenced by writing<sup>1</sup>.

1 As to the meaning of 'land' see PARA 14 note 2 ante.

2 See the Law of Property Act 1925 s 53(1)(b) (replacing the Statute of Frauds (1677) s 7). A trust may be declared of personal estate without writing: see PARA 24 ante; and TRUSTS vol 48 (2007 Reissue) PARA 644.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/148. Assignments.

## 148. Assignments.

Assignments of the following things must be in writing: (1) equitable interests in land whether created by the assignment or previously subsisting<sup>1</sup>; (2) other equitable interests or trusts, subsisting at the time of the assignment<sup>2</sup>; (3) equitable mortgages<sup>3</sup> (except, perhaps, mortgages by deposit of title deeds where assigned for value<sup>4</sup>); (4) shares and debentures (other than bearer securities)<sup>5</sup>; (5) government stock<sup>6</sup>; (6) copyright<sup>7</sup>; (7) a patent<sup>8</sup>; (8) a registered trade mark<sup>9</sup>; (9) statutory legal assignments of policies of life assurance or marine insurance<sup>10</sup>; and (10) legal assignments of legal choses or things in action<sup>11</sup>.

Since an assignee of a registered design must apply for registration of his title to it<sup>12</sup>, an assignment inter vivos of a registered design should, in practice, be in writing, so that the title of the assignee may readily be proved.

1 See the Law of Property Act 1925 s 53(1)(a); and PARA 24 ante. Legal estates, legal interests and legal charges in or over land may in general only be conveyed or transferred by deed (so as to give the grantee a legal estate, interest or charge): see ss 1(4), 52(1); and PARA 14 ante. For exceptions see s 52(2) (as amended); and PARA 15 ante.

2 See PARA 24 ante.

3 See the Law of Property Act 1925 s 53(1)(c); and PARA 24 ante. See also *Re Richardson, Shillito v Hodson* (1885) 30 ChD 396, CA. For the purposes for which a transfer having effect as a deed is necessary see the Law of Property Act 1925 ss 52(1), 114, 115(2); para 14 ante; and MORTGAGE vol 77 (2010) PARAS 365-366, 649. For the equitable principle by which a person who has paid off the mortgage debt is subrogated to the rights of the mortgagee in the absence of a formal transfer see eg *Cracknell v Janson* (1879) 11 ChD 1 at 18, CA.

4 See *Dryden v Frost* (1838) 3 My & Cr 670 at 673. However, it has not been possible since the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see SALE OF LAND vol 42 (Reissue) PARAS 29-40) to create a mortgage by the mere deposit of title deeds: *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA. A vendor's or purchaser's lien may, it seems, be transferred by parol: see *Dryden v Frost* supra; and LIEN vol 68 (2008) PARA 869. A pawnee's special property in the thing pledged may be transferred by sub-pledge: see eg *Donald v Suckling* (1866) LR 1 QB 585; and PLEDGES AND PAWNS vol 36(1) (2007 Reissue) PARA 22 et seq.

5 However, the Uncertificated Securities Regulations 2001, SI 2001/3755 (as amended) enable title to units of a security to be evidenced otherwise than by a certificate and transferred otherwise than by a written instrument in accordance with a computer-based system: see reg 2(1); and COMPANIES vol 14 (2009) PARA 421 et seq; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1339. See also PARA 21 ante.

6 See the Government Stock Regulations 2004, SI 2004/1611, reg 15 (as amended); the Stock Transfer Act 1963 s 1(1), (4)(c) (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1339.

7 See COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 160.

8 See the Patents Act 1977 s 30 (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 374.

9 See the Trade Marks Act 1994 s 24; and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 129.

10 See the Policies of Assurance Act 1867 s 5, Schedule; the Marine Insurance Act 1906 s 50(3); and INSURANCE vol 25 (2003 Reissue) PARA 389. As to notice of assignment of a policy of life assurance see PARA 155 note 6 post.

11 See CHOSSES IN ACTION vol 13 (2009) PARA 14 et seq.

12 See the Registered Designs Act 1949 s 19 (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 700.



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**149. Assent on death.**

An assent by the personal representative of a deceased person to the vesting in any person of a legal estate in real property (including leaseholds and other chattels real) must be in writing<sup>1</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 ss 36(1), (4), 55(1)(xix); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 3, 563-564. As to implied assents see *Re King's Will Trusts* [1964] Ch 542, [1964] 1 All ER 833; *Re Edwards' Will Trusts, Edwards v Edwards* [1982] Ch 30, [1981] 2 All ER 941, CA; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 564.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/150. Acknowledgments of title or of debts.

**150. Acknowledgments of title or of debts.**

An acknowledgment for the purposes of the Limitation Act 1980, must be in writing, signed by the person by whom it is made or his agent<sup>1</sup>.

<sup>1</sup> See the Limitation Act 1980 s 30; and LIMITATION PERIODS vol 68 (2008) PARA 1186.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(2) TRANSACTIONS FOR WHICH AN INSTRUMENT UNDER HAND IS NECESSARY/151. Releases and abandonment of rights.

### **151. Releases and abandonment of rights.**

A release of a right in general is required to be by deed<sup>1</sup>, but a release under hand only will be effectual on equitable principles if made for valuable consideration<sup>2</sup>. A release of a purely equitable estate, interest, or right, in any lands or goods, may also, it seems, be made in writing signed by the releasor, although gratuitous<sup>3</sup>.

A renunciation by the holder of a bill of exchange of his rights against the acceptor, or against other parties to the bill, must be in writing, unless, in the case of the acceptor, the bill is delivered up to him<sup>4</sup>.

A disclaimer of any onerous property by a trustee in bankruptcy or a liquidator must be in writing signed by the trustee or liquidator as the case may be<sup>5</sup>.

1 See PARA 12 ante.

2 See *Taylor v Manners* (1865) 1 Ch App 48. Even writing is not essential provided that there is valuable consideration: *Steeds v Steeds* (1889) 22 QBD 537; *Yeomans v Williams* (1865) LR 1 Eq 184; and see PARA 12 ante.

3 See PARA 25 ante.

4 See the Bills of Exchange Act 1882 s 62; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1555. Delivery to the executors of the acceptor would apparently be sufficient, but not to his legatee: *Edwards v Walters* [1896] 2 Ch 157 at 172, CA.

5 See the Insolvency Act 1986 ss 178, 315 (as amended); the Insolvency Rules 1986, SI 1986/1925, rr 4.187, 6.178; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 475; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 869.

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## 152. Notices in writing.

In numerous cases notices are required to be in writing, for example: (1) notice of an assignment of a debt or other legal thing in action given to the debtor or other person liable<sup>1</sup>; (2) notice of an assignment of a policy of life assurance<sup>2</sup>; (3) notice served<sup>3</sup> of breach of covenant preparatory to re-entry, and other statutory notices<sup>4</sup>; (4) notice by the tenant for life or statutory owner to trustees of intention to sell, lease or mortgage settled land<sup>5</sup>; (5) notice to treat on the purchase of land under compulsory powers<sup>6</sup>; (6) notices under the Landlord and Tenant Acts 1927 and 1954<sup>7</sup>; (7) notice of distress before sale of the goods distrained<sup>8</sup>; (8) notice to make a tenant wilfully holding over liable for double the yearly value of the premises<sup>9</sup>; (9) certain notices given between landlords, tenants and mortgagees of agricultural holdings<sup>10</sup>; and (10) notices under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 where application is made for the grant of a new tenancy<sup>11</sup>.

Any notice required to be served by an instrument affecting property executed or coming into operation after 31 December 1925 is, it seems, required to be in writing, unless a contrary intention appears<sup>12</sup>.

Notices given by a company need not be under its common seal provided that they are signed by certain authorised officers<sup>13</sup>.

1 See the Law of Property Act 1925 s 136 (as amended); and CHOSER IN ACTION vol 13 (2009) PARA 72 et seq. Notice is only necessary to complete the legal title to the thing in action; it is not necessary to complete the equitable title arising under an assignment for value; and is only necessary to prevent a subsequent assignee from gaining priority, for which purpose it need not, in all cases, be in writing.

2 See the Policies of Assurance Act 1867 s 3; and INSURANCE vol 25 (2003 Reissue) PARA 549.

3 See under the Law of Property Act 1925 s 146 (as amended): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq.

4 See *ibid* s 196(1); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 621; REAL PROPERTY vol 39(2) (Reissue) PARA 204.

5 See the Settled Land Act 1925 s 101(1); and SETTLEMENTS vol 42 (Reissue) PARA 783.

6 See the Lands Clauses Consolidation Act 1845 s 18; the Compulsory Purchase Act 1965 s 5 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 616.

7 See the Landlord and Tenant Act 1927 s 23; the Landlord and Tenant Act 1954 s 66; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 703.

8 See the Distress for Rent Act 1689 s 1 (repealed with savings); *Wilson v Nightingale* (1846) 8 QB 1034; and DISTRESS vol 13 (2007 Reissue) PARAS 1011, 1044, 1056.

9 See the Landlord and Tenant Act 1730 s 1 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 668.

10 As to a tenant's notice of intention to remove fixtures see AGRICULTURAL LAND vol 1 (2008) PARA 336; as to notice of increase of rent see AGRICULTURAL LAND vol 1 (2008) PARA 338; as to notice to terminate a tenancy see AGRICULTURAL LAND vol 1 (2008) PARA 373; as to a tenant's counter-notice after service of a notice to quit see AGRICULTURAL LAND vol 1 (2008) PARA 374; as to notice of claim on termination of a tenancy see AGRICULTURAL LAND vol 1 (2008) PARA 470.

11 See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(6), applying the Law of Property Act 1925 s 196 (as amended); and see note 4 *supra*.

12 See *ibid* s 196(1), (5); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 227, 621; MORTGAGE vol 77 (2010) PARA 454.

13 See the Companies Clauses Consolidation Act 1845 s 139; the Companies Act 1985 s 41 (as amended); and COMPANIES vol 14 (2009) PARA 678; COMPANIES vol 15 (2009) PARA 1679. A company is no longer required to have a common seal: see s 36A(3) (as added); para 41 *ante*; and COMPANIES vol 14 (2009) PARA 288.

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### **153. Appointment of guardian.**

A parent who has parental responsibility<sup>1</sup> for his child may appoint another individual to be the child's guardian in the event of his death<sup>2</sup>, and a guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death, as may a special guardian<sup>3</sup>.

Such an appointment does not have effect unless it is made in writing, is dated and is signed by the person making the appointment or: (1) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the statutory requirements<sup>4</sup>; or (2) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature<sup>5</sup>.

1 For the meaning of 'parental responsibility' see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134.

2 Children Act 1989 s 5(3); and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148.

3 Ibid s 5(4) (as amended); and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148.

4 I.e the requirements of the Wills Act 1837 s 9 (as substituted): see WILLS vol 50 (2005 Reissue) PARAS 351, 353, 360, 362.

5 Children and Young Persons Act 1989 s 5(5); and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 148.

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#### **154. Other matters required to be in writing.**

Matters required to be in writing also include<sup>1</sup> the following<sup>2</sup>: (1) a representation or assurance made or given concerning the character, conduct, credit, ability, trade, or dealings of any person to the intent that he may obtain credit, money, or goods<sup>3</sup>; (2) a declaration of an undertenant or lodger to prevent distress upon his goods<sup>4</sup>; (3) consent of a beneficiary to a breach of trust so as to entitle the trustee to indemnity against him<sup>5</sup>; (4) a consent or agreement so as to prevent the acquisition of easements<sup>6</sup>; (5) a statement, indicating how the amount of a redundancy payment has been calculated, to be given by the employer to the employee on making such a payment otherwise than in pursuance of a decision of a tribunal which specifies the amount of the payment to be made<sup>7</sup>; (6) a consent by the landlord of an agricultural holding to the making of long-term new improvements<sup>8</sup> and to the payment of compensation for improvements by the incoming to the outgoing tenant<sup>9</sup>. Moreover, settlements and other instruments frequently require that a consent should be given in writing, such as a consent by the tenant for life to a sale, to an advance to a child, or to an investment.

1 As to other matters required to be in writing see PARA 144 et seq ante.

2 This list must not be taken to be exhaustive; the requirement of writing is very general, and, apart from statute, convenience requires that most matters should be put into writing.

3 Statute of Frauds Amendment Act 1828 s 6. The writing must be signed by the party to be charged: s 6. See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1052, 1054.

4 See the Law of Distress Amendment Act 1908 s 1 (as amended); and DISTRESS vol 13 (2007 Reissue) PARAS 1011, 1044, 1056.

5 See the Trustee Act 1925 s 62 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 1131. Where the beneficiary instigates or requests the breach of trust, writing is not necessary: *Griffith v Hughes* [1892] 3 Ch 105; *Re Somerset, Somerset v Earl Poulett* [1894] 1 Ch 231, CA.

6 See the Prescription Act 1832 ss 1-3 (as amended); *Bewley v Atkinson* (1879) 13 ChD 283, CA; and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 241.

7 See the Employment Rights Act 1996 s 165(1); and EMPLOYMENT vol 40 (2009) PARA 837.

8 See the Agricultural Holdings Act 1986 s 67; and AGRICULTURAL LAND vol 1 (2008) PARA 436.

9 See the Agricultural Holdings Act 1986 s 69(2), (3), Sch 9 para 5(2); and AGRICULTURAL LAND vol 1 (2008) PARAS 430, 434.

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### **(3) FORM AND EXECUTION**

#### **155. Form and contents.**

The term 'instrument in writing' is used to include not only instruments actually written, but all other instruments in which words are permanently represented in visible form whether by printing, lithography, or otherwise, or partly in one way and partly in another<sup>1</sup>. The writing may be in ink or pencil, or otherwise<sup>2</sup>. The form in which the instrument is expressed is in general immaterial, provided that the intention of the author can be collected from it<sup>3</sup>, and provided that it contains all statutory particulars required to be inserted<sup>4</sup>.

A bill of exchange may be in any words provided it corresponds to the statutory definition<sup>5</sup>. In general, when a contract or other matter is required to be in writing, the form is immaterial provided that the document contains the particulars of the transaction<sup>6</sup>.

1 See *Dench v Dench* (1877) 2 PD 60 (will partly lithographed, partly written); and cf the meaning of 'writing' in the Interpretation Act 1889 s 20 (repealed); and the Interpretation Act 1978 s 5, Sch 1; and see SALE OF LAND vol 42 (Reissue) PARA 39. See also PARA 2 note 5 ante.

2 *Geary v Physic* (1826) 5 B & C 234 (indorsement of promissory note in pencil). As to pencil alterations to a document in print, type or ink writing see *Co-operative Bank plc v Tipper* [1996] 4 All ER 366; and PARA 159 post.

3 *Brodrick v Brown* (1855) 1 K & J 328.

4 See the Statute of Frauds (1677) s 4 (as amended); and PARA 141 note 1 ante.

An acknowledgment of title to land or money charged on land, or of a specialty debt, may be contained in a letter (*Stansfield v Hobson* (1852) 16 Beav 236, 3 De GM & G 620, CA), a petition for sale admitting an incumbrance (*Re West's Estate* (1879) 3 LR 1r 77), or other informal document. As to the particulars which may be supplied by extrinsic evidence see LIMITATION PERIODS vol 68 (2008) PARA 1186 et seq.

The Employment Rights Act 1996 s 1 provides that where an employee begins employment with an employer, the employer must give to the employee a written statement of particulars of employment: see s 1(1); and EMPLOYMENT vol 39 (2009) PARA 93 et seq.

5 See *Ellison v Collingridge* (1850) 9 CB 570; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1414.

6 As to memoranda under the Statute of Frauds (1677) see note 4 supra. Occasionally the statute requiring an instrument to be in writing makes a reference to its form or contents; thus eg a notice of assignment under the Policies of Assurance Act 1867 s 3 must give the date and purport of the assignment (see INSURANCE vol 25 (2005 Reissue) PARA 549); a notice to trustees and their solicitor of the intention of the tenant for life or statutory owner to sell etc under the Settled Land Act 1925 s 101 must be sent by registered letter or recorded delivery letter (see the Settled Land Act 1925 s 101(1); the Recorded Delivery Service Act 1962 s 1(1); and SETTLEMENTS vol 42 (Reissue) PARA 783); a notice or other document issued by a company must contain its name in legible characters (see the Companies Act 1985 s 349(1)(b); and COMPANIES vol 14 (2009) PARA 220). As to the contents of a policy of marine insurance see the Marine Insurance Act 1906 s 23(1); and INSURANCE vol 25 (2005 Reissue) PARA 220. As to an instrument of dissolution of a building society see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2066. In general the form is merely conditioned by the requirement that the instrument must be in writing and signed.

### **UPDATE**

#### **155 Form and contents**



NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/(3) FORM AND EXECUTION/156. Signature.

### 156. Signature.

An agreement in writing must be signed either by all the parties, or by the party to be charged therewith, in such a manner as to authenticate it<sup>1</sup>. Under the Statute of Frauds (1677) it is sufficient that the writing is signed by the party to be charged therewith<sup>2</sup>, and various statutes which require a contract to be in writing refer only to signature by one party<sup>3</sup>. Other statutes require the writing to be signed by both or all the parties<sup>4</sup>. Thus, in relation to a contract for the sale or other disposition of land, the document incorporating the terms<sup>5</sup> or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed<sup>6</sup> by or on behalf of each party to the contract<sup>7</sup>. Where a statute simply requires an agreement to be in writing, without expressly referring to signature, it may be sufficient if the agreement is signed by the party to be charged therewith<sup>8</sup>. In other documents the signature must be by the party to whose intention the document gives effect: in an appointment, by the appointor; in the creation of a trust, by the settlor; in an assignment, by the assignor; in an acknowledgment, by the person who makes the acknowledgment; in a notice or demand, by the person giving the notice or making the demand<sup>9</sup>.

In general, attestation is not required for an instrument under hand. The place and manner of signature are immaterial, provided that the signature is inserted in such a manner as to authenticate the document<sup>10</sup>, and that it can be identified as representing the name of the party<sup>11</sup>.

Although a contract has been signed in such a form as to appear unconditional, extrinsic evidence may be adduced to show that it was not intended to take effect until the performance of a condition precedent<sup>12</sup>.

1 It was suggested in *Hunter v Parker* (1840) 7 M & W 322 that signature was not necessary in an instrument called for by statute (a bill of sale of a ship under 3 & 4 Will 4c 55 (Registering of British Vessels) (1833) s 31 (repealed)) unless expressly required; but authentication by signature is practically essential to a document in writing, and is usually essential to give it legal effect.

2 See the Statute of Frauds (1677) s 4 (as amended); and PARAS 141 note 1, 155 note 4 ante. So an agreement for remuneration for non-contentious business under the Solicitors Act 1974 s 57 (as amended) must be signed by the person to be bound thereby or his agent: see further LEGAL PROFESSIONS vol 66 (2009) PARAS 942, 945. A consent or agreement in writing under the Prescription Act 1832 s 3 (as amended) is sufficiently signed by the owner of the dominant tenement: *Bewley v Atkinson* (1879) 13 ChD 283, CA; and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 241.

3 A marine insurance policy must be signed by or on behalf of the insurer: see the Marine Insurance Act 1906 s 24(1); and INSURANCE vol 25 (2003 Reissue) PARA 221.

4 A contract to lend money in consideration of the receipt of a share of profits, without incurring partnership liabilities, must be signed by all the parties: see the Partnership Act 1890 s 2(3)(d); and PARTNERSHIP vol 79 (2008) PARA 20. A seaman's agreement must be signed by the seaman and by or on behalf of the persons employing him: see the Merchant Shipping Act 1995 s 25(1); and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 450. A regulated agreement under the Consumer Credit Act 1974 must be signed by the debtor or hirer and by or on behalf of the creditor or owner: see s 61(1); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 160.

5 Thus there was no sufficient signature in *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA, where a letter incorporated a plan, and the plan but not the letter was signed, and the signature on the plan alone did not suffice to create a contract.

6 Printing or typing of a name does not constitute a signature for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA (citing *Goodman v J Eban Ltd* [1954] 1 QB 550 at 561, [1954] 1 All ER 763 at 768, CA,

per Denning LJ: 'In modern English usage when a document is required to be 'signed' by someone, that means that he must write his name with his own hand on it').

7 Law of Property (Miscellaneous Provisions) Act 1989 s 2(3); and see SALE OF LAND vol 42 (Reissue) PARA 29. This provision does not apply in relation to contracts made before 28 September 1989 (ie the date on which s 2 (as originally enacted) came into force): ss 2(7), 5(3), (4)(a). Section 2 (as amended) does not apply in relation to: (1) a contract to grant such a lease as is mentioned in the Law of Property Act 1925 s 54(2) (short leases) (see SALE OF LAND vol 42 (Reissue) PARA 29); (2) a contract made in the course of a public auction; or (3) a contract regulated under the Financial Services and Markets Act 2000 other than a regulated mortgage contract, and nothing in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) affects the creation or operation of resulting, implied or constructive trusts: s 2(5) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 317(1), (2)). It does, however, apply to the variation of a contract within the Law of Property (Miscellaneous Provisions) Act 1989: *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA.

As to public auction see AUCTION vol 2(3) (Reissue) PARA 201 et seq. As to activities regulated under the Financial Services and Markets Act 2000 see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 80 et seq. As to regulated mortgage contracts see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 203 et seq.

8 Opinions on this point vary. In cases on the Attorneys' and Solicitors' Act 1870 s 4 (repealed: see now the Solicitors Act 1974 s 59 (as amended)), it has been said that the agreement in writing for special remuneration must be signed by both parties (*Re Lewis, ex p Munro* (1876) 1 QBD 724; *Pontifex v Farnham* (1892) 41 WR 238); but on the analogy of the Statute of Frauds (1677) it has been decided that signature by the client is sufficient (*Re Thompson, ex p Baylis* [1894] 1 QB 462; *Re Jones* [1895] 2 Ch 719 (on appeal [1896] 1 Ch 222, CA); *Bake v French (No 2)* [1907] 2 Ch 215). See also *TA Ruf & Co v Pauwels* [1919] 1 KB 660 at 666, CA. An arbitration agreement must be in writing but need not be signed by the parties: see the Arbitration Act 1996 ss 5, 6; and ARBITRATION vol 2 (2008) PARA 1213.

9 In some cases the signature is prescribed by statute. For example, an instrument creating a trust of land must be signed by the party entitled to declare the trust (see PARA 24 ante); an assignment of a thing in action by the assignor (see the Law of Property Act 1925 s 136(1); and CHOSSES IN ACTION vol 13 (2009) PARA 72); a disposition of an equitable interest or trust, by the person disposing of the same or his agent (see PARA 25 ante); and an assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor (see the Copyright, Designs and Patents Act 1988 s 92; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 176).

10 *Johnson v Dodgson* (1837) 2 M & W 653. Thus where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement: *Ogilvie v Foljambe* (1817) 3 Mer 53 at 62; *Probert v Parker* (1830) 1 Russ & M 625; *Lobb v Stanley* (1844) 5 QB 574; *Holmes v Mackrell* (1858) 3 CBNS 789; cf *Godwin v Francis* (1870) LR 5 CP 295 (name at head of telegram); *Schneider v Norris* (1814) 2 M & S 286; *Sarl v Bourdillon* (1856) 1 CBNS 188 (entry of names of sellers and buyers in order book); *Durrell v Evans* (1862) 1 H & C 174, Ex Ch. The name of a person signing as witness may authenticate the instrument if he cannot be a witness: *Coles v Trecothick* (1804) 9 Ves 234 at 251; *Barkworth v Young* (1856) 4 Drew 1 at 13-15; cf *Gosbell v Archer* (1835) 2 Ad & El 500. A signature may authenticate a memorandum added afterwards (*Bluck v Gompertz* (1852) 7 Exch 862); but a signature not introduced so as to authenticate the entire instrument will not suffice (*Caton v Caton* (1867) LR 2 HL 127; *Stokes v Moore* (1786) 1 Cox Eq Cas 219).

11 Signature in pencil or by initials or by a mark is sufficient: see SALE OF LAND vol 42 (Reissue) PARA 39. The acknowledgment of a person who was too ill to write was held insufficient in *Re Clendinning, ex p Anderson* (1859) 9 L Ch R 284. Where a party holds the pen and another traces his name, it is his signature: *Harrison v Elvin* (1842) 3 QB 117; *Helsham v Langley* (1841) 11 LJ Ch 17. A rubber stamp imprinting a facsimile of the party's signature or mark suffices, provided that (unless there are exceptional circumstances, eg physical disability, preventing him) it is impressed by himself: see *Goodman v J Eban Ltd* [1954] 1 QB 550, [1954] 1 All ER 763, CA; *LCC v Agricultural Food Products* [1955] 2 QB 218, [1955] 2 All ER 229, CA. A typed or printed name (not a facsimile of the party's signature) may be insufficient: *Goodman v J Eban Ltd* [1954] 1 QB 550 at 559, [1954] 1 All ER 763 at 767, CA, per Lord Evershed MR; *R v Cowper* (1890) 24 QBD 533, CA; *McDonald v John Twinn Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA. See also PARA 30 ante.

12 *Wallis v Littell* (1861) 11 CBNS 369 at 375; *Pattle v Hornibrook* [1897] 1 Ch 25; and see *Furness v Meek* (1857) 27 LJ Ex 34. See PARAS 37-38 ante, 188 post.

## UPDATE

### 156-157 Signature ... Signature by agent

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning

of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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### 157. Signature by agent.

In general, where a contract or other document is required to be in writing, a signature by an agent on behalf of the party to be bound is sufficient<sup>1</sup>, and it is not necessary that the agent should be appointed in writing<sup>2</sup>.

In some cases, however, a statute requires that the signature should be that of the party himself, and then an agent cannot sign for him<sup>3</sup>; in others, signature by an agent is expressly allowed<sup>4</sup>, and occasionally with the requirement that he is to be authorised in writing<sup>5</sup>.

An agent can either sign the name of his principal or his own name but in the latter case the fact of the agency should appear on the document, or he will be liable as a principal<sup>6</sup>.

1 *Re Whitley Partners Ltd* (1886) 32 ChD 337, CA; *LCC v Agricultural Food Products Ltd* [1955] 2 QB 218 at 223-225, [1955] 2 All ER 229 at 232-233, CA, per Romer LJ.

A submission to arbitration under the Arbitration Acts must be in writing (see the Arbitration Act 1996 ss 5, 6; and ARBITRATION vol 2 (2008) PARA 1213); but since there is no need for signature a fortiori it may be signed by agents. It would appear that signature by agents suffices in the case of an instrument of dissolution of a building society, which requires the consent of a special majority of the members testified 'by their signature' (see the Building Societies Act 1986 s 87(1); *Dennison v Jeffs* [1896] 1 Ch 611; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2066). See generally AGENCY vol 1 (2008) PARA 14 et seq. As to execution on behalf of a company or corporation aggregate see the Law of Property Act 1925 s 74 (as amended); the Powers of Attorney Act 1971 s 7 (as amended); the Companies Act 1985 ss 36, 37 (s 36 as substituted); the Corporate Bodies' Contracts Act 1960 ss 1, 2 (as amended); and AGENCY vol 1 (2008) PARA 45.

2 See AGENCY vol 1 (2008) PARAS 14-15.

3 Personal signature is necessary when a statute requires that the instrument must be signed by a particular party, without adding 'or his agent'; such as contracts by seamen under the Merchant Shipping Act 1995 s 25(1); see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 450. A representation as to character must be signed by the 'party to be charged therewith' (see the Statute of Frauds Amendment Act 1828 s 6; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1054), and this requires personal signature (*Swift v Jewsbury and Goddard* (1874) LR 9 QB 301, Ex Ch; *Hirst v West Riding Union Banking Co* [1901] 2 KB 560, CA). A disclaimer by a trustee in bankruptcy under the Bankruptcy Act 1914 s 54 (repealed: see now the Insolvency Act 1986 ss 178, 315 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq) must be signed by him personally: *Wilson v Wallani* (1880) 5 Ex D 155.

4 Under the Statute of Frauds (1677) s 4 (as amended) (see PARAS 141 note 1, 155 note 4 ante), the signature may be by an agent 'lawfully authorised'; and an agent may sign under the Partnership Act 1890 s 2(3)(d) (see PARTNERSHIP vol 79 (2008) PARA 20); the Solicitors Act 1974 s 57 (as amended) (see LEGAL PROFESSIONS vol 66 (2009) PARAS 942, 945); and the Marine Insurance Act 1906 s 24 (see INSURANCE vol 25 (2005 Reissue) PARA 221). All acknowledgments under the Limitation Act 1980 s 29 (see LIMITATION PERIODS vol 68 (2008) PARAS 1182-1184) may be made by or to an agent: see s 30(2); and LIMITATION PERIODS vol 68 (2008) PARA 1185.

5 This is so under the Law of Property Act 1925 s 53(1)(a), (c): see PARA 24 ante.

6 See AGENCY vol 1 (2008) PARA 45 et seq. If the donee of a power of attorney is an individual he may, if he thinks fit, execute any instrument with his own signature and do any other thing in his own name, by the authority of the donor of the power, and any instrument so executed or thing so done is as effective as if it had been executed or done by the donee with the signature or, as the case may be, in the name, of the donor of the power: Powers of Attorney Act 1971 s 7(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1, Sch 1 para 7; and the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, art 10(1), Sch 1 paras 5, 6). However, where an instrument is executed by the donee as a deed, it is as effective as if executed by the donee in a manner which would constitute due execution of it as a deed by the donor only if it is executed in accordance with the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3)(a) (see PARA 33 ante): Powers of Attorney Act 1971 s 7(1A) (added by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, Sch 1 paras 5, 7). See further PARA 1 ante. In general, since an agent cannot delegate his authority, his personal signature is required. Hence, an auctioneer's clerk cannot

sign on behalf of a purchaser, unless authorised by the purchaser: see AUCTION vol 2(3) (Reissue) PARA 211. Delegation of the act of signing to a clerk, however, may be permitted by the ordinary course of business: *Johnson v Oseinton* (1869) LR 4 Exch 107; and see *Brown v Tombs* [1891] 1 QB 253 (notice of claim to parliamentary vote). See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1473. As to execution on behalf of a company see COMPANIES vol 14 (2009) PARA 288.

## **UPDATE**

### **156-157 Signature ... Signature by agent**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

### **157 Signature by agent**

NOTE 1--Corporate Bodies' Contracts Act 1960 s 2 substituted: SI 2009/1941.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/158. Alteration before execution.

#### **(4) ALTERATION AND CANCELLATION**

##### **158. Alteration before execution.**

A writing which is intended to be under hand only can be altered by erasure, or interlineation, or otherwise, before it is signed, but it lies upon the party who puts the instrument in suit to explain the alteration and show when it was made<sup>1</sup>.

<sup>1</sup> The presumption that alterations are made before the execution of the instrument, which arises in the case of a deed (see PARA 81 ante), does not apply to an instrument under hand, although the reason for the presumption, namely, that the instrument cannot be altered, after it is executed, without fraud or wrong, and that the presumption is against fraud or wrong (*Doe d Tatum v Catomore* (1851) 16 QB 745; and see PARA 81 ante) seems to exist equally in each case. In the case of instruments other than deeds, the principle has prevailed that it lies on the party who seeks to enforce an altered instrument to prove the circumstances under which the alteration took place: *Henman v Dickinson* (1828) 5 Bing 183; *Knight v Clements* (1838) 8 Ad & El 215; *Cariss v Tattersall* (1841) 2 Man & G 890; *Clifford v Parker* (1841) 2 Man & G 909; *Doe d Tatum v Catomore* supra at 746. However, if the obligation to be enforced does not arise under the altered instrument, but the instrument is introduced merely to explain the obligation, and the alteration does not affect its use for this purpose, no explanation of the alteration need be given: *Earl of Falmouth v Roberts* (1842) 9 M & W 469; *Hutchins v Scott* (1837) 2 M & W 809.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/159. Material alteration by one party.

### **159. Material alteration by one party.**

An alteration in a material part of an instrument under hand made by, or with the consent of, one party to it, but without the consent of the other party, makes the instrument void to the extent that the party responsible for the alteration cannot enforce the instrument against a party not so responsible. The latter party can, however, enforce it against the former, if he can prove the original form of the instrument; and where the instrument operates as a conveyance, the alteration will not prejudice it in this respect<sup>1</sup>.

Where a document consists of print, type or ink writing, the most natural inference to draw of an amendment in pencil is that it was not, and was not intended to be, an operative and final alteration<sup>2</sup>.

<sup>1</sup> The effect of an alteration of an instrument in writing is the same as in the case of deeds. The principle established for deeds by *Pigot's Case* (1614) 11 Co Rep 26b was applied to bills of exchange by *Master v Miller* (1791) 4 Term Rep 320 (affd (1793) 2 Hy Bl 141, Ex Ch); 1 Smith LC (13th Edn) 780; and see *Burchfield v Moore* (1854) 3 E & B 683; *Gardner v Walsh* (1855) 5 E & B 83 at 90. The principle has also been extended to other instruments, such as insurance policies (*Laird v Robertson* (1791) 4 Bro Parl Cas 488; *Campbell v Christie* (1817) 2 Stark 64); bought and sold notes (*Powell v Divett* (1812) 15 East 29; *Mollett v Wackerbarth* (1847) 5 CB 181); guarantees (*Davidson v Cooper* (1844) 13 M & W 343, Ex Ch; *Bank of Hindustan, China and Japan v Smith* (1867) 36 LJCP 241); charterparties (*Croockewit v Fletcher* (1857) 1 H & N 893); building contracts (*Pattinson v Luckley* (1875) LR 10 Exch 330); Bank of England notes (*Suffell v Bank of England* (1882) 9 QBD 555, CA); and a reception order in lunacy (*Lowe v Fox* (1887) 12 App Cas 206, HL). The rules on the subject have already been stated (see PARA 81 et seq ante), and they are repeated here in abbreviated form, with such authorities as are specially applicable to instruments under hand. In modern conditions it has been held that the critical question is that of prejudice or potential prejudice as a result of the alteration: *Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd* [2000] 1 All ER (Comm) 76, [2000] 1 WLR 1135, CA. The rules with regard to alteration of a bill of exchange are now contained in the Bills of Exchange Act 1882 s 64(1) and the Decimal Currency Act 1969 s 3(2): see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1559. As to what alterations in a bill of exchange are material see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1560. As to what alterations are material in other instruments see PARA 82 ante. Stated generally, the principle is that an alteration is material if it alters the legal effect of the instrument, but not if it adds something that would be implied, or supplies an obvious clerical omission (*Aldous v Cornwell* (1868) LR 3 QB 573 ('on demand' inserted in a promissory note which expressed no time for payment)); and it is also material if, without altering the legal effect, it is important in the use of the instrument, such as the alteration of the number of a Bank of England note (*Suffell v Bank of England* supra; and see *Leeds and County Bank v Walker* (1883) 11 QBD 84; cf *Re Howgate and Osborn's Contract* [1902] 1 Ch 451; *Koch v Dicks* [1933] 1 KB 307, CA (alteration of place where bill drawn)). The party who has altered the instrument and thus loses his remedy on it does not lose his remedy on the original consideration, unless he has by the alteration deprived the other party of some remedy: *Sutton v Toomer* (1827) 7 B & C 416; *Atkinson v Hawdon* (1835) 2 Ad & El 628; and cf *Alderson v Langdale* (1832) 3 B & Ad 660. The innocent party can only enforce the contract subject to any restrictions or conditions originally contained in it: *Pattinson v Luckley* (1875) LR 10 Exch 330.

<sup>2</sup> *Co-operative Bank plc v Tipper* [1996] 4 All ER 366.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/160. Material alteration by stranger.

**160. Material alteration by stranger.**

An alteration made while the instrument is in the custody of one party, although not made with his knowledge or consent, has the same effect in avoiding the instrument as if made by him, on the principle that he who has the custody of an instrument made for his benefit is bound to preserve it in its original state<sup>1</sup>. It is, however, doubtful whether this rule applies when the alteration is made against the will and in fraud of the party having the custody<sup>2</sup>, and an alteration made by a stranger, when the instrument is in the custody of neither party, does not affect the document, if its original state can be proved<sup>3</sup>.

1 *Davidson v Cooper* (1844) 13 M & W 343, Ex Ch; *Bank of Hindustan, China and Japan v Smith* (1867) 36 LJCP 241; and see *Pattinson v Luckley* (1875) LR 10 Exch 330; *Robinson v Mollett* (1875) LR 7 HL 802 at 813 per Blackburn J.

2 *Lowe v Fox* (1887) 12 App Cas 206 at 217, HL, per Lord Herschell.

3 *Henfree v Bromley* (1805) 6 East 309.

This paragraph was cited as conveniently summarising the law in *Spector v Ageda* [1973] Ch 30 at 49, [1971] 3 All ER 417 at 431 per Megarry J.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/161. Alteration by accident or mistake.

**161. Alteration by accident or mistake.**

To avoid the instrument the alteration must be intentional; if it is due to accident or to mistake it will not prejudice the party responsible for the custody of the instrument<sup>1</sup>. An intentional alteration, however, made under a mistake as to the legal effect of the instrument avoids it<sup>2</sup>.

<sup>1</sup> See PARA 86 ante. As to mistake see also *Raper v Birkbeck* (1812) 15 East 17; *Wilkinson v Johnson* (1824) 3 B & C 428; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC.

<sup>2</sup> *Bank of Hindustan, China and Japan v Smith* (1867) 36 LJCP 241.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/162. Alteration with consent.

**162. Alteration with consent.**

An alteration in an instrument under hand made with the consent of all parties does not avoid it, and it takes effect as altered<sup>1</sup>, but if the result is to create in effect a fresh instrument, it will require restamping<sup>2</sup>. An alteration which is not material does not affect the operation of the instrument by whomsoever it is made<sup>3</sup>.

1 See PARA 84 ante. This sentence was cited with approval in *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486 at 496, [1971] 1 WLR 248 at 259 per Megarry J, and applied to an alteration in a nomination, although it was a unilateral instrument requiring signature by the nominator in the presence of a witness.

2 See *Hamelin v Bruck and Hirschfield* (1846) 9 QB 306; *Downes v Richardson* (1822) 5 B & Ald 674.

3 See PARA 87 ante. As to marine insurance policies see *Sanderson v Symonds* (1819) 1 Brod & Bing 426.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/3. INSTRUMENTS UNDER HAND ONLY/ (4) ALTERATION AND CANCELLATION/163. Cancellation.

**163. Cancellation.**

An instrument under hand is cancelled and made void by striking through the signature with the intention that it is to become void; and this may be done by or under the direction of the person who is entitled to the benefit of the instrument<sup>1</sup>; but cancellation by an agent without authority has no effect<sup>2</sup>.

1 See PARA 76 ante. The authorities there cited relate to deeds, but similar principles apply, it seems, to instruments under hand. As to the cancellation of bills of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1556.

2 *Bank of Scotland v Dominion Bank (Toronto)* [1891] AC 592, HL.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/164. The principles of construction.

## 4. INTERPRETATION

### (1) GENERAL RULES OF INTERPRETATION

#### 164. The principles of construction.

In 1998 a fundamental change overtook the branch of the law concerned with the principles by which contractual documents are construed<sup>1</sup>. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life<sup>2</sup>. The principles may be summarised as follows:

- 15 (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract<sup>3</sup>.
- 16 (2) The background was famously described as the 'matrix of fact'<sup>4</sup>, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception mentioned in head (3) below, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man<sup>5</sup>. This proposition should be regarded with some circumspection. It has been observed that no authority was cited for it, and that it may not have been the subject of argument; and suggested that surrounding circumstances should be confined to what the parties had in mind, and what was going on around them at the time when they were making the contract<sup>6</sup>.
- 17 (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in a claim for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way utterances would be interpreted in ordinary life. The boundaries of this exception are in some respects unclear<sup>7</sup>.
- 18 (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax<sup>8</sup>.
- 19 (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had<sup>9</sup>.

It has been observed that there are documents in which the need for certainty is paramount and in relation to which admissible background is restricted to avoid the possibility that the same document may have different meanings for different people according to their knowledge of the background<sup>10</sup>. Documents required by bankers' commercial credits fall within this category<sup>11</sup>.

1 See *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98, [1998] 1 WLR 896, HL. 'Almost all the old intellectual baggage of 'legal' interpretation has been discarded': *Investors Compensation Scheme Ltd v West Bromwich Building Society* supra at 114 and 912 per Lord Hoffmann. See also *Atari Corp'n (UK) Ltd v Electronics Boutique Stores (UK) Ltd*[1998] QB 539, [1998] 1 All ER 1010, CA; *Cargill International SA v Bangladesh Sugar and Food Industries Corp'n*[1998] 2 All ER 406 at 413, [1998] 1 WLR 461 at 468, CA, per Potter LJ ('modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result'); *Don King Productions Inc v Warren*[1998] 2 All ER 608, [1999] 3 WLR 276 (affd [2000] Ch 291, [1999] 2 All ER 218, CA); *Kuma v AGF Insurance Ltd*[1998] 4 All ER 788, [1999] 1 WLR 1747; *C Itoh & Co Ltd v Companhia de Navegacao Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd* [1999] 1 Lloyd's Rep 115, CA.

2 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912, HL, per Lord Hoffmann.

3 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912, HL, per Lord Hoffmann.

4 See *Prenn v Simmonds*[1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386, HL, per Lord Wilberforce. See also *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[1976] 3 All ER 570, [1976] 1 WLR 989, HL; *Gilmartin v West Sussex County Council* (1976) 242 Estates Gazette 203, Times, 11 December, CA; *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd* [1999] 1 Lloyd's Rep 225; *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejeusidie)* [1999] 1 Lloyd's Rep 249.

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912, HL, per Lord Hoffmann.

6 See *Scottish Power plc v Britoil (Exploration) Ltd* [1997] 47 LS Gaz R 30, CA, per Staughton LJ. See also *National Bank of Sharjah v Dellborg* (9 July 1997) Lexis, CA.

7 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

8 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann. See also *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[1997] AC 749, [1997] 3 All ER 352, HL.

9 *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann. 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense': *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at 201, [1984] 3 All ER 229 at 233, HL, per Lord Diplock.

10 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[1997] AC 749 at 779, [1997] 3 All ER 352 at 380, HL, per Lord Hoffmann. In this case, which involved a notice under a break clause in a lease, it was held that the old rule as applied for instance in *Hankey v Clavering*[1942] 2 KB 326, [1942] 2 All ER 311, CA (which stated that if the words of a document were capable of referring unambiguously to a person or thing, no extrinsic evidence was admissible to show that the author was using them to refer to something or someone else) should no longer be followed: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* supra at 779 and 381 per Lord Hoffmann. See also *Garston v Scottish Widows' Fund and Life Assurance Society*[1998] 3 All ER 596, [1998] 2 EGLR 73, CA (notice to determine business tenancy and application for new tenancy under the Landlord and Tenant Act 1954). However, it could not cure the defect where a purported break notice was given by someone claiming to act as agent for an assignee, no assignment having taken place: *Lemmerbell Ltd v Britannia LAS Direct Ltd*[1998] 3 EGLR 67, [1998] 48 EG 188, CA. See also *Clickex Ltd v McCann* (1999) 32 HLR 324, [1999] 2 EGLR 63, CA (notice served for the purpose of creating an assured shorthold tenancy under the Housing Act 1988 s 20 (as substituted and amended) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue)

PARA 1051) ineffective where dates differed from the tenancy agreement so that it was not obvious which was correct).

11 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 779, [1997] 3 All ER 352 at 380, HL, per Lord Hoffmann. 'Article 13(a) of the Uniform Customs and Practice for Commercial Credits (1993 Revision) says that the documents must 'upon their face' appear to be in accordance with the terms and conditions of the credit': *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* supra at 779 and 380 per Lord Hoffmann.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/165. Object of interpretation.

### **165. Object of interpretation.**

It has been said that the object of all interpretation of a written instrument is to discover the real intention of the author, the written declaration of whose mind it is always considered to be<sup>1</sup>, and that consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit<sup>2</sup>. However, the law is not concerned with subjective intentions. All that matters is the objective meaning of the words which the author of those words has used. The law is concerned with what the user of the words would objectively have been understood to mean<sup>3</sup>. The same construction is placed on the words of a deed as on those of an instrument under hand only<sup>4</sup>, and on mercantile contracts<sup>5</sup>, policies of insurance<sup>6</sup> and guarantees<sup>7</sup> as on other instruments, though, exceptionally, there are documents, such as banker's commercial credits, in which the need for certainty is paramount and where the admissible background is restricted<sup>8</sup>. While no special rules of construction apply to pension schemes, they should be construed in a purposive and practical, rather than a literal way<sup>9</sup>.

Documents receive the same construction in equity as at law<sup>10</sup>, for there is no such thing as equitable, as distinct from legal, construction of an instrument, equity in this respect following the law<sup>11</sup>. When a general principle for the construction of an instrument has once been laid down, and that construction comes to be accepted and people afterwards make contracts and other instruments on that understanding, the court will normally adhere to that recognised construction and make the most accurate application of it to the circumstances of the particular case, notwithstanding that it may have been applied differently in other cases<sup>12</sup>. Were the court not to proceed on these lines it would be construing instruments contrary to the meaning of those who made them<sup>13</sup>. The House of Lords, of course, retains its power to overrule a rule of construction even though it may have been applied for many years<sup>14</sup>.

There are a few statutory provisions relating to the interpretation of written instruments<sup>15</sup>. Such a provision prescribing that in all or certain classes of documents particular words are to have particular meanings will override the ordinary principles of construction<sup>16</sup>. An interpreting enactment may be qualified so as to apply unless the contrary intention appears, that is unless the context and such extrinsic evidence as may be admissible indicate that the enacted rule is not to have effect. Some enactments are qualified by a formula referring to the context, such as 'unless the context otherwise requires'; any contrary intention must then, it seems, be found in the text of the instrument, though not necessarily in the immediate context of the word construed<sup>17</sup>.

1 *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 91 per Plumer MR (affd (1821) 4 Bli 1, HL); *Evans v Vaughan* (1825) 4 B & C 261 at 266 per Abbott CJ. Where a document on its face a deed, but witnessed as a will, was admitted to probate, it was said to be 'clear that extrinsic evidence is admissible for the purpose of shewing with what intention an ambiguous paper has been executed': *Re Slinn's Goods* (1890) 15 PD 156 at 158.

As to the construction of contractual documents generally see PARA 164 ante.

2 *Shep Touch* 86; *Throckmerton v Tracy* (1555) 1 Plowd 145 at 160 per Staundford J; *Hilbers v Parkinson* (1883) 25 ChD 200 at 203 per Pearson J. 'As far as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to do': see Co Litt 314b.

3 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 779, [1997] 3 All ER 352 at 376, HL, per Lord Hoffmann. See also PARA 164 ante.

4 See *Seddon v Senate* (1810) 13 East 63 at 74 per Lord Ellenborough CJ.



- 5 *Southwell v Bowditch* (1876) 1 CPD 374 at 376, CA, per Jessel MR.
- 6 *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ; *Carr v Montefiore* (1864) 5 B & S 408 at 428, Ex Ch, per Erle CJ.
- 7 *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC, per Swift J; affd [1932] 1 KB 423, CA. See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq.
- 8 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL. Dicta in the cases referred to in notes 5-7 supra may require reconsideration: see PARA 164 ante.
- 9 *Derby Daily Telegraph Ltd v Pensions Ombudsman* [1999] ICR 1057, [1999] IRLR 476.
- 10 *Gladstone v Birley* (1817) 2 Mer 401; *Re Terry and White's Contract* (1886) 32 ChD 14 at 21, CA, per Lord Esher MR. See also *Pentland v Stokes* (1812) 2 Ball & B 68 at 73.
- 11 *Scott v Liverpool Corpn* (1858) 28 LJ Ch 230 at 235; and see *Midland Great Western Rly of Ireland v Johnson* (1858) 6 HL Cas 798. There is no rule that equity will construe a contract in terms joint as joint and several (*Kendall v Hamilton* (1879) 4 App Cas 504 at 521, 537-539, HL); see, however, on this point CONTRACT vol 9(1) (Reissue) PARA 1079 et seq; EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 779; PARTNERSHIP vol 79 (2008) PARA 41.
- 12 *Browning v Wright* (1799) 2 Bos & P 13 at 24 per Lord Eldon CJ; *Re Kilpatrick's Policies Trusts, Kilpatrick v IRC* [1966] Ch 730, [1966] 2 All ER 149, CA. In construing a commercial document which uses a standard form, previous decisions on the meaning of that form which are likely to have been accepted by those adopting the form will be followed, whether or not they are authorities binding on the court: *The Annefield* [1971] P 168 at 183, [1971] 1 All ER 394 at 405, CA, per Lord Denning MR, at 185 and 406 per Phillimore LJ; *WN Lindsay & Co Ltd v European Grain and Shipping Agency* [1962] 2 Lloyd's Rep 387 at 396 per Megaw J (revsd but not on this point [1963] 1 Lloyd's Rep 437, CA); and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 227 et seq.
- 13 *Re National Coffee Palace Co, ex p Panmure* (1883) 24 ChD 367 at 370, CA, per Brett MR. As to the effect of usage upon contracts generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.
- 14 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL, where it was held that the rule which had been applied for at least 200 years to the construction of a notice under a break clause in a lease should no longer be followed: it was said to be 'highly artificial and capable of producing results which offend against common sense': *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* supra at 778 and 378 per Lord Hoffmann.
- 15 See PARA 171 post.
- 16 *Master and Brethren of the Hospital of St Cross v Lord Howard de Walden* (1795) 6 Term Rep 338.
- 17 *Re Evans, ex p Evans* [1891] 1 QB 143, CA.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/166. How intention is ascertained.

### 166. How intention is ascertained.

The intention must be gathered from the written instrument<sup>1</sup> read in the light of such extrinsic evidence as is admissible for the purpose of construction<sup>2</sup>. Traditionally it has been said that the function of the court is to ascertain what the parties meant by the words which they have used<sup>3</sup>; to declare the meaning of what is written in the instrument, not of what was intended to have been written<sup>4</sup>; to give effect to the intention as expressed<sup>5</sup>, the expressed meaning being, for the purpose of interpretation, equivalent to the intention<sup>6</sup>. These traditional statements must now be read in the light of the changed approach to the construction of documents to be found in more recent decisions of the House of Lords<sup>7</sup>. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention<sup>8</sup>. If, however, in any particular respect, the intention is clear on the whole instrument, effect will be given to that intention, even though it is not stated in express words<sup>9</sup>. Various implications and presumptions will also be made where it is necessary or settled by law or usage<sup>10</sup> to do so.

It has traditionally been held that ordinary rules of construction must be applied, although by so doing the real intention of the parties may in some instances be defeated; and it has been said that such a course tends to establish a greater degree of certainty in the administration of the law<sup>11</sup>. This remains the case, though under the changed approach it is less likely that the parties' intentions will be frustrated, and it is not thought that greater uncertainty in the meaning of a document will be created<sup>12</sup>.

1 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 526, HL, per Coleridge J, and at 556 per Parke B; *Rickman v Carstairs* (1833) 5 B & Ad 651 at 663 per Denman CJ; *Northland Airlines Ltd v Dennis Ferranti Meters Ltd* (1970) 114 Sol Jo 845, CA (construction of telegrams).

As to the construction of contractual documents generally see PARA 164 ante.

2 See PARAS 185-209 post. An instrument may be one of a series by which a single transaction is carried into effect, or may incorporate another instrument. All such instruments must be read together for the purpose of ascertaining the intention: see PARA 176 post.

3 See *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co* (1887) 12 App Cas 484 at 491, HL, per Lord Halsbury LC; *Barton v Fitzgerald* (1812) 15 East 530 at 541 per Lord Ellenborough CJ.

4 See the cases cited in note 1 supra; and *Marshall v Berridge* (1881) 19 ChD 233, CA.

5 *Hayne v Cummings* (1864) 16 CBNS 421 at 427; *Monypenny v Monypenny* (1861) 9 HL Cas 114 at 146 per Lord Wensleydale; *Fullwood v Akerman* (1862) 11 CBNS 737; *McConnel v Murphy* (1873) LR 5 PC 203 at 219.

6 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 525, HL, per Coleridge J. Though where the nature of the deed and the relation of the parties, as father and child, give a clue to the 'natural intention', the court will struggle with the language to give effect to it: *Hope v Lord Clifden* (1801) 6 Ves 499 at 509 per Lord Eldon LC; *Clayton v Earl of Glengall* (1841) 1 Dr & War 1 at 17 per Sugden LC.

7 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; *Investors Compensation Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL; and PARAS 164-165 ante.

8 *Smith v Lucas* (1881) 18 ChD 531 at 542 per Jessel MR; *Monypenny v Monypenny* (1861) 9 HL Cas 114 at 146 per Lord Wensleydale; *Re Meredith, ex p Chick* (1879) 11 ChD 731 at 739, CA, per Brett LJ. See also *Zoan v Rouamba* [2000] 2 All ER 620, [2000] 1 WLR 1509, CA (a document is not to be given the meaning of one party's perceived intention).

9 'I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction': *Clayton v Earl of Glengall* (1841) 1 Dr & War 1 at 14 per Sugden LC.

10 See PARA 181 post; and CONTRACT vol 9(1) (Reissue) PARA 780 et seq; CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq.

If no contrary intention is indicated, it will be presumed that, where a contract is to be performed in the country in which it has been made, the law of that country is intended to apply, but if it is to be performed in another country then the law of that other country is intended to apply: *Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, CA.

11 See *Mallan v May* (1844) 13 M & W 511 at 517 per Pollock CB.

12 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; *Investors Compensation Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL; and PARAS 164-165 ante.

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### 167. Functions of judge and jury.

The interpretation of a written document is, generally speaking, a matter of law for the court<sup>1</sup>. However, where there is a jury<sup>2</sup> it must ascertain as a fact the meaning of technical or commercial terms<sup>3</sup> used in a written contract and also, in order to enable the court to construe the document, the surrounding circumstances of the particular case<sup>4</sup>; where there is a latent ambiguity in a written instrument, the question of which meaning was intended is a question for the jury<sup>5</sup>; where the contract is oral or is to be inferred from a series of acts and things done, in the course of which letters are written, but the contract does not depend solely upon the letters, it is for the jury to say what is the real contract between the parties<sup>6</sup>.

Thus usually it is a question of fact for the jury whether an instrument has been delivered as an escrow, but where facts are proved by evidence in writing which is undisputed, as, for example, where a form of contract is sent enclosed in a letter explaining why and on what terms it is sent, the construction of the letter, and the question whether the contract is delivered as an escrow, is for the judge<sup>7</sup>.

1 *Macbeath v Haldimond* (1786) 1 Term Rep 172; *Ashpittel v Sercombe* (1850) 5 Exch 147; *Glaverbel SA v British Coal Corp* [1995] FSR 254, [1995] RPC 255, CA; and see note 3 infra. As to foreign documents see PARA 201 post.

As to the construction of contractual documents generally see PARA 164 ante.

2 Juries are rarely summoned in civil claims: see JURIES vol 61 (2010) PARA 820.

3 See *Hill v Evans* (1862) 4 De GF & J 288; and PARA 170 post. As to ordinary words see *Brutus v Cozens* [1973] AC 854 at 861, [1972] 2 All ER 1297 at 1298-1299, HL, per Lord Reid; *Evans v Godber* [1974] 3 All ER 341 at 348, [1974] 1 WLR 1317 at 1325, DC, per Lord Widgery CJ; *Belgravia Navigation Co SA v Cannor Shipping Ltd, The Troll Park* [1988] 2 Lloyd's Rep 423, CA (meaning of an ordinary English word not a question of law but solely one of fact for the determination of the fact finding tribunal).

4 See *Hutchison v Bowker* (1839) 5 M & W 535; *Neilson v Harford* (1841) 8 M & W 806 at 823 per Parke B; *Simpson v Margitson* (1847) 11 QB 23; *Key v Cotesworth* (1852) 7 Exch 595; *Hill v Evans* (1862) 4 De GF & J 288; *Lyle v Richards* (1866) LR 1 HL 222; *Bowes v Shand* (1877) 2 App Cas 455, HL; *Robey v Arnold* (1898) 14 TLR 220, CA; *George D Emery Co v Wells* [1906] AC 515, PC. The rule that the construction of a document is for the court applies equally where the original document is lost and extrinsic evidence is given of its contents: *Berwick v Horsfall* (1858) 4 CBNS 450. It is for the court, and not the jury, to decipher badly written words: *R v Hucks* (1816) 1 Stark 521. Extrinsic evidence may be given of the surrounding circumstances for the purpose of explaining, but not of varying, the words used: *Mumford v Gething* (1859) 7 CBNS 305 at 321; *Macdonald v Longbottom* (1860) 1 E & E 977; *Carr v Montefiore* (1864) 5 B & S 408, Ex Ch.

5 See PARA 209 post.

6 *Jones v Littledale* (1837) 6 Ad & El 486; *Wilkinson v Stoney* (1838) 1 Jebb & S 509; *Moore v Garwood* (1849) 4 Exch 681 at 685, 690, Ex Ch; *Gurney v Womersley* (1854) 4 E & B 133; *Begg v Forbes* (1855) 3 CLR 336; *Holding v Elliott* (1860) 5 H & N 117; *Stones v Dowler* (1860) 29 LJ Ex 122, Ex Ch; *Williamson v Barton* (1862) 7 H & N 899; *Bolckow v Seymour* (1864) 17 CBNS 107; *Brook v Hook* (1871) LR 6 Exch 89; *Lakeman v Mountstephen* (1874) LR 7 HL 17; *Long v Millar* (1879) 4 CPD 450, CA; *Stollery v Maskelyne* (1898) 15 TLR 79, CA (affd sub nom *Maskelyne v Stollery* (1899) 16 TLR 97, HL).

7 *Furness v Meek* (1857) 27 LJ Ex 34.

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### **168. Nature of contract.**

Although the nature of a contract does not depend upon the name given to it (whether for example it is 'insurance' or 'guarantee'), but upon its substance<sup>1</sup>, nevertheless, where a particular contract is described by the parties to it as a 'policy of insurance', this fact will, in construing it, be treated by the court as affording some indication of an intention not to enter into a 'guarantee'<sup>2</sup>.

<sup>1</sup> *Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ. The dicta of the Court of Appeal in this case on this subject are unaffected by the reversal of the decision itself by the House of Lords (sub nom *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL). See *Re Denton's Estate, Licenses Insurance Corp'n and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 188, CA, per Vaughan Williams LJ. See also *Reynolds v Wheeler* (1861) 10 CBNS 561 at 566; *Sudbury Corp'n v Empire Electric Light and Power Co Ltd* [1905] 2 Ch 104 at 116 per Warrington J; *Shaw v Royce Ltd* [1911] 1 Ch 138 at 147 per Warrington J; *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221 at 1230, [1969] 1 WLR 1645 at 1655-1656, CA, per Winn LJ.

As to the construction of contractual documents generally see PARA 164 ante.

<sup>2</sup> *Dane v Mortgage Insurance Corp'n* [1894] 1 QB 54, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1022.

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### 169. Words to be taken in ordinary sense.

The words of a written instrument must in general be taken in their ordinary or natural sense<sup>1</sup> notwithstanding the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry out<sup>2</sup>; but if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words<sup>3</sup>; and where the literal (in the sense of ordinary, natural or primary) construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned<sup>4</sup>. So, too, considerations of inconvenience may be admitted when the construction of the document is ambiguous<sup>5</sup>. If, however, the intention is clearly and unequivocally expressed, then, however capricious it may be, the court is bound by it, unless it is plainly controlled by other parts of the instrument<sup>6</sup>. Most expressions have been said to have a natural meaning, in the sense of their primary meaning in ordinary speech<sup>7</sup>. In some cases, however, the notion of words having a natural meaning has been said not to be a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural<sup>8</sup>. Further, the concept of the natural and ordinary meaning is not very helpful when on any view the words have not been used in a natural and ordinary way<sup>9</sup>.

The rule is that in construing all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further<sup>10</sup>. The instrument must be construed according to its literal import, unless there is something in the subject or context which shows that this cannot be the meaning of the words<sup>11</sup>.

1 In their plain, ordinary, and popular sense: see *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ (see PARA 174 note 1 post); *Beard v Moira Colliery Co Ltd* [1915] 1 Ch 257 at 268, CA; *Great Western Rly Co and Midland Rly Co v Bristol Corp* (1918) 87 LJ Ch 414, HL. A stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party may not take advantage of his own wrong: *New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1, HL. See also *Patent Castings Syndicate Ltd v Etherington* [1919] 2 Ch 254, CA; *Watson v Haggitt* [1928] AC 127, PC (meaning of 'net profits'); *Toepfer v Continental Grain Co* [1974] 1 Lloyd's Rep 11, CA (meaning of 'quality' in contract for sale of wheat providing that official certificates should be conclusive as to quality); *Allen v South Eastern Electricity Board* [1988] 1 EGLR 171, [1988] 07 EG 71, CA (meaning of phrase 'cannot take full advantage of the said planning permission'); *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, [1996] 3 All ER 46, HL (meaning of 'the sum actually paid'); *Spring House Freehold Ltd v Mount Cook Land Ltd* [2001] EWCA Civ 1833, [2002] 2 All ER 822 (clause in a lease had the meaning as reasonably understood by the commercial men who had entered into the agreement for the lease).

As to the construction of contractual documents generally see PARA 164 ante.

2 *Mallan v May* (1844) 13 M & W 511 at 517; *Grey v Pearson* (1857) 6 HL Cas 61 at 106 per Lord Wensleydale; *Directors etc of the Great Western Rly Co v Rous* (1870) LR 4 HL 650 at 659 per Lord Westbury; *Taylor v St Helens Corp* (1877) 6 ChD 264 at 270, CA; *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114 at 131, HL, per Lord Blackburn; *Lee v Alexander* (1883) 8 App Cas 853 at 869-870, HL; *Birrell v Dryer* (1884) 9 App Cas 345, HL; *Smith v Cooke* [1891] AC 297 at 298, HL, per Lord Halsbury LC; *Edwardes' Menu Co*

*Ltd v Chudleigh* (1897) 14 TLR 64, CA (agreement for letting of bars etc of theatre 'so long as it should remain in his hands'); *Denaby and Cadeby Co v Fenton* (1898) 14 TLR 268 (meaning of 'fatal accident' in a mine); *Felix Hadley & Co Ltd v Hadley* [1898] 2 Ch 680 (meaning of 'securities' for debts); *Wheeler v Fradd* (1898) 14 TLR 302, CA (agreement to repay money after company should go to allotment); *Loates v Maple* (1903) 88 LT 288 ('fail to procure a licence'); *Elliott v Crutchley* [1906] AC 7 at 9, HL, per Lord Halsbury LC; *Croydon RDC v Sutton District Water Co* (1908) 72 JP 217, CA ('damage to property caused by or resulting from execution of works'); *James Shoolbred & Co v Wyndham and Albery* (1908) Times, 1 December (work to be done to 'entire satisfaction' of defendants); *London Music Hall Ltd v Austin* (1908) Times, 16 December; *General Asphalt Co v Anglo-Saxon Petroleum Co Ltd* (1932) 48 TLR 276, HL (agreement to use 'rights' to procure third party to deliver oil). See, however, *M'Cowan v Baine and Johnston, The Niobe* [1891] AC 401, HL, where 'ship' was interpreted to include the ship's tug, although for special reasons (see at 407 per Lord Watson). See also *Blore v Giulini* [1903] 1 KB 356, following *Hartshorne v Watson* (1838) 4 Bing NC 178, where a reservation of a landlord's right of action under a lease was implied notwithstanding that the contract provided for avoidance (in certain events which had happened) of every clause in the lease; *Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd and National Trust Co Ltd* [1909] AC 293, PC; and PARA 170 note 7 post.

3 *Lloyd v Lloyd* (1837) 2 My & Cr 192 at 202 per Lord Cottenham LC ('If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention'). So much regard must not be paid to the natural and proper meaning of the words as to pervert the intention of the parties: *Shep Touch* 87. There is no rule of general application that the same meaning ought to be given to an expression in every part of the document in which it appears; a difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary, or permissible to do so: *Watson v Haggitt* [1928] AC 127, PC. But see *Re Birks, Kenyon v Birks* [1900] 1 Ch 417 at 418, CA, per Lindley MR ('I do not know whether it is law or a canon of construction but it is good sense to say that whenever in a deed or will or other document you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear'). It is also an accepted rule that the construction of an enactment may be approached on the footing that a word will bear the same meaning throughout the statute, though this rule will readily yield to other indications where injustice or absurdity would result: see *Re National Savings Bank Association Ltd* (1866) 1 Ch App 547 at 550; *Madras Electric Supply Corpn Ltd v Boarland* [1955] AC 667 at 685, [1955] 1 All ER 753 at 759, HL, per Lord MacDermott; *Gartside v IRC* [1968] AC 553, [1968] 1 All ER 121, HL; and STATUTES vol 44(1) (Reissue) PARA 1484.

4 'If a rational exposition can be given consistent with a fair interpretation of the language used, the court would then relinquish its most valuable powers if it did not abandon a construction, which, although more consonant with the literal interpretation of the words written, leads to a capricious and irrational result': *Laird v Tobin* (1830) 1 Mol 543 at 547 per Hart LC. See also *Re Rothermere, Mellors, Basden & Co v Coutts & Co* [1943] 1 All ER 307; and for a further statement of the principle see *Locke v Dunlop* (1888) 39 ChD 387 at 393, CA, per Stirling J, quoting from the judgment of Lord Cranworth LC, in *Abbott v Middleton* (1858) 7 HL Cas 68 at 89 (both cases on wills). The strict and ordinary sense is taken where the words interpreted in this sense are sensible with reference to the context and extrinsic circumstances: *Enlayde Ltd v Roberts* [1917] 1 Ch 109 at 119.

5 *Re Alma Spinning Co, Bottomley's Case* (1880) 16 ChD 681 at 686 per Jessel MR; *Re Rothermere, Mellors, Basden & Co v Coutts & Co* [1943] 1 All ER 307 ('first charge on the estate').

6 *Hume v Rundell* (1824) 2 Sim & St 174 at 177 per Leach V-C; *Abbott v Middleton* (1858) 7 HL Cas 68 at 89 per Lord Cranworth LC; *Bathurst v Errington* (1877) 2 App Cas 698 at 709, HL; *Re Whitmore, Walters v Harrison* [1902] 2 Ch 66 at 70, CA. If the meaning of ordinary words 'is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract': *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 2 EGLR 128 at 129, PC.

7 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 384, [1996] 3 All ER 46 at 50, HL, per Lord Mustill.

8 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391, [1996] 3 All ER 46 at 57, HL, per Lord Hoffmann.

9 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 116, [1998] 1 WLR 896 at 914, HL, per Lord Hoffmann.

10 *Grey v Pearson* (1857) 6 HL Cas 61 at 106 per Lord Wensleydale, and at 78 per Lord Cranworth LC. This rule Lord Wensleydale called the golden rule of construction: see *Caledonian Rly Co v North British Rly Co* (1881) 6 App Cas 114 at 130 per Lord Blackburn, and at 121 per Lord Selborne LC; *Re Levy, ex p Walton* (1881) 17 ChD 746 at 751, CA, per Jessel MR; *Spencer v Metropolitan Board of Works* (1882) 22 ChD 142 at 148, CA, per Chitty J. Lord Wensleydale enunciated the rule on several occasions: see *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876; *Abbott v Middleton* (1858) 7 HL Cas 68 at 114; *Thellusson v Lord Rendlesham* (1859) 7 HL Cas 429 at 519. It was adopted by Lord Wensleydale from the judgment of Burton J in *Warburton v Loveland d Ivie* (1828) 1 Hud & B 623, Ex Ch. See also *Bland v Crowley* (1851) 6 Exch 522 at 529 per Parke B; *Rhodes v Rhodes* (1882) 7 App Cas 192 at 205, PC; *Diederichsen v Farquharson Bros* [1898] 1 QB 150 at 159, CA, per Rigby LJ; *Re*

*Sassoon, IRC v Ezra* [1933] Ch 858 at 878, CA (affd sub nom *IRC v Ezra* [1935] AC 96, HL). See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq.

11 *Lowther v Bentinck* (1874) LR 19 Eq 166 at 169 per Jessel MR. A departure may be made from the literal meaning of words, if reading the words literally leads to an absurdity: *Wallis v Smith* (1882) 21 ChD 243 at 257, CA. See also *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank plc* [2002] EWCA Civ 691, [2002] All ER (D) 232 (May) (in regard to construction of surety bonds, clear words (or the necessity of supplying those clear words by implication) were required if subrogation rights were to be removed).



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### **170. Ordinary meaning determined by common usage.**

The ordinary meaning of a word, usually called its literal or primary meaning, is not necessarily its etymological meaning<sup>1</sup>, but that which the ordinary usage of society applies to it<sup>2</sup>. Hence this is the meaning which prima facie is to be given to the word in construing the instrument in which it occurs<sup>3</sup>. The meaning is not to be capriciously interfered with, and when it is interfered with, the interference must be as slight as possible<sup>4</sup>. Thus evidence may not be received to show that the language was intended to be used by the parties with any meaning other than the ordinary and natural meaning<sup>5</sup>. However, there are three main exceptions to the rule<sup>6</sup>.

First, where it has been found as a fact (by the jury, if there is one) that certain words, as for example words or phrases employed in art, or commerce, or in a particular locality, or among a particular sect or group of people, have been used in a special technical sense other than their ordinary sense, then the court will construe them in such special technical sense<sup>7</sup>. In certain cases extrinsic evidence may also be given to explain a latent ambiguity, or to show that the contract was made subject to a condition unexpressed in the writing<sup>8</sup>.

Secondly, where the context itself shows that words were not intended to be used in their ordinary sense, the words are construed in harmony with the context<sup>9</sup>, and greater regard is paid to the intention of the parties as appearing from the instrument when construed as a whole than to any particular words they may have used to express their intention<sup>10</sup>.

Thirdly, where the court concludes from the background that something must have gone wrong with the language, the law does not require the judge to attribute to the parties an intention which they plainly could not have had<sup>11</sup>. If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense<sup>12</sup>.

1 Etymology is a very unsafe guide to meaning: *Hext v Gill* (1872) 7 Ch App 705n per Wickens V-C; on appeal (1872) 7 Ch App 699.

As to the construction of contractual documents generally see PARA 164 ante.

2 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 527, HL, per Coleridge J; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL; and see PARAS 164, 169 ante. As to the power of the court to consult dictionaries to ascertain meaning see PARA 200 post. See also *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, [1966] 1 All ER 1039, HL.

3 *Holt & Co v Collyer* (1881) 16 ChD 718 at 720 per Fry J (where there is a popular and common word used in an instrument, that word must be construed prima facie in its popular and common sense; if it is a word of a technical or legal character it must be construed according to its technical or legal meaning; but before evidence can be given of the secondary meaning of a word, the court must be satisfied, from the circumstances of the case, that the word ought to be construed not in its popular or primary signification, but according to its secondary intention). See, however, *Bain v Cooper* (1842) 9 M & W 701 at 708 per Lord Abinger CB; *Re Bedson's Trusts* (1885) 28 ChD 523 at 525, CA, per Brett MR. As to latent ambiguities see PARA 209 post.

4 *Lucena v Lucena* (1876) 7 ChD 255 at 260 per Jessel MR.

5 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 565-566, HL; *Hitchin v Groom* (1848) 5 CB 515; *McClellan v Kennard* (1874) 9 Ch App 336 at 345, 349; *Great Western Rly Co and Midland Rly Co v Bristol Corpn* (1918) 87 LJ Ch 414, HL.

6 See *M'Cowan v Baine and Johnston, The Niobe* [1891] AC 401 at 408, HL. There are also less important exceptions to the rule: see PARAS 171, 174, 198-207 post.

7 *Studdy v Sanders* (1826) 5 B & C 628; *Goblet v Beechey* (1829) 3 Sim 24 (revsd (1831) 2 Russ & My 624); *Bold v Rayner* (1836) 1 M & W 343; *Mallan v May* (1844) 13 M & W 511 at 518; *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555-556, HL; *Robey v Arnold* (1898) 14 TLR 220, CA (meaning of 're-engagement' in theatrical agent's contract). Evidence of such usage of words is analogous to translation: *Shore v Wilson* supra; *Grant v Maddox* (1846) 15 M & W 737 at 746 per Platt B; and see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 669. As to translations generally see PARAS 200-203 post. In *Biddlecombe v Bond* (1835) 4 Ad & El 332, and *Parker v Gossage* (1835) 2 Cr M & R 617, the court refused to construe the word 'insolvency' in a technical sense, there being nothing in the context to justify such a construction. Where a person covenanted not to use a house as a beerhouse, but opened a grocer's shop, where he carried on the sale of beer to be drunk off the premises, evidence to show that 'beerhouse' was understood in the trade to include such a shop was rejected: *Holt & Co v Collyer* (1881) 16 ChD 718; and see *Elliott v Turner* (1845) 2 CB 446 at 461, Ex Ch. In *Mowbray, Robinson & Co v Rosser* (1922) 91 LJB 524, CA, the court refused to construe the word 'shipment' as meaning loading into railway cars, by custom of the trade in the country of origin of the goods, as that construction would be inconsistent with the expressed term, and would not explain, but vary, the contract.

8 As to the admissibility of extrinsic evidence to alter or explain a written agreement see PARA 185 et seq post.

9 *St John, Hampstead Vestry v Cotton* (1886) 12 App Cas 1 at 6, HL; *M'Cowan v Baine and Johnston, The Niobe* [1891] AC 401 at 408, HL. See *Re Terry's Will* (1854) 19 Beav 580; *Monypenny v Monypenny* (1861) 9 HL Cas 114; *Hext v Gill* (1872) 7 Ch App 699 at 712; *Hill v Crook* (1873) LR 6 HL 265 at 283 ('children'); *Pigg v Clarke* (1876) 3 ChD 672 ('family'); *Tucker v Linger* (1882) 21 ChD 18 at 36, CA ('minerals'); *College Credit Ltd v National Guarantee Corp Ltd* [2004] EWHC 978 (Comm), [2004] 2 All ER (Comm) 409 ('advance').

10 *Ford v Beech* (1848) 11 QB 852 at 866.

11 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

12 *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at 201, [1984] 3 All ER 229 at 233, HL, per Lord Diplock.

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### **171. Statutory meanings.**

In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after 31 December 1925, unless the context otherwise requires, 'person' includes a corporation; and the singular includes the plural and the masculine includes the feminine and vice versa<sup>1</sup>.

In the absence of a definition or of any indication of a contrary intention, the expressions 'full age', 'infant', 'infancy', 'minor', 'minority' and similar expressions in any deed, will or other instrument of whatever nature (not being a statutory provision<sup>2</sup>) made on or after 1 January 1970 are to be construed by applying the provision in the Family Law Reform Act 1969<sup>3</sup> that a person attains full age on attaining the age of 18 (or on 1 January 1970 if he had then already attained the age of 18 but not the age of 21)<sup>4</sup>. For the purposes of the above provisions of the Family Law Reform Act 1969, notwithstanding any rule of law, a will or codicil executed before 1 January 1970<sup>5</sup> must not be treated as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date<sup>6</sup>.

In the Family Law Reform Act 1987 and enactments passed and instruments made after 4 April 1987<sup>7</sup>, references (however expressed) to any relationship between two persons are, unless the contrary intention appears, to be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time<sup>8</sup>.

On and after 15 February 1971 any reference in any cheque, bill of exchange, promissory note, money order or postal order (or in certain similar instruments<sup>9</sup>) drawn, made or issued before that date to an amount of money in the currency previously in force (ie pounds, shillings and old pence) is, so far as it refers to an amount in shillings or pence, to be read as referring to the corresponding amount in decimal currency calculated in accordance with the provisions of Schedule 1 to the Decimal Currency Act 1969<sup>10</sup>. Where an amount of money in the old currency payable on or after 15 February 1971 as one of a series of payments of the same amount payable periodically<sup>11</sup> (not being an amount payable to or by a registered friendly society or industrial assurance company under any friendly society or industrial assurance company contract made before that date<sup>12</sup> or payable to an employee or the holder of any office by way of wages, salary or remuneration<sup>13</sup>) is not a whole number of pounds, so much of it as is in shillings or pence may be paid by paying the corresponding amount in the decimal currency calculated as above<sup>14</sup>. In any event, where an amount of money in the old currency which is not a whole number of pounds falls to be paid after the 31 August 1971<sup>15</sup>, the amount payable in respect of so much of it as is in shillings or pence is the corresponding amount in decimal currency calculated as above<sup>16</sup>.

In a marine insurance policy in the form set out in Schedule 1 to the Marine Insurance Act 1906, or other similar form, the terms and expressions mentioned in that Schedule are to be construed as having the scope and meaning assigned to them in the Schedule unless the context of the policy otherwise requires and subject to the other provisions of that Act<sup>17</sup>.

1 Law of Property Act 1925 s 61. See *Re A Solicitors' Arbitration* [1962] 1 All ER 772, [1962] 1 WLR 353 (singular including plural in a partnership expulsion clause). The statutory provision that the masculine includes the feminine and vice versa may more readily be held not to apply to a provision particularly referring to men, or to women, as opposed to an expression, such as a pronoun, importing the masculine or the feminine: *Re Denley's Trust Deed, Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373, [1968] 3 All ER 65 (reference to employees' subscriptions 'at the rate of two pence per week per man'). 'Month' means calendar month: Law of Property Act 1925 s 61; and see PARA 174 note 5 post. The definition of 'person' is in accordance with *Willmott v*

*London Road Car Co Ltd* [1910] 2 Ch 525, CA. As to statutory definitions generally see PARA 165 text and notes 15-17 ante.

As to the construction of contractual documents generally see PARA 164 ante.

2 Statutory provisions, whenever enacted, are given a similarly adjusted interpretation by the Family Law Reform Act 1969 s 1(1), (2)(a), (3), (4), (6), Sch 2 (as amended), Sch 3 paras 5-9. However, s 1 is not to affect the construction of any statutory provision where it is incorporated in and has effect as part of any deed, will or other instrument the construction of which is not affected by the corresponding adjustment made (to post-1969 non-statutory instruments) by the Act: Sch 3 para 9.

3 See *ibid* s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1. The time of attainment of a specified age expressed in years is to be the commencement of the relevant anniversary of the date of birth: see s 9; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 2.

4 See *ibid* s 1(1), (2); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

5 *Ie* the date on which *ibid* s 1 came into force: s 28(3).

6 *Ibid* s 1(7).

7 *Ie* the date on which the Family Law Reform Act 1987 s 1 came into force: s 34(2).

8 *Ibid* s 1(1) (replacing the Family Law Reform Act 1969 s 15 (repealed), which applied to dispositions made on or after 1 January 1970).

9 See the Decimal Currency Act 1969 s 3(3) (amended by the Statute Law (Repeals) Act 1989). In addition to those specifically mentioned in the text, the instruments to which this provision applies include: (1) other instruments to which the Cheques Act 1957 s 4 (as amended) applies (the Consumer Credit Act 1974 s 83 does not apply to a non-commercial agreement, or to any loss in so far as it arises from misuse of an instrument to which the Cheques Act 1957 s 4 (as amended) applies: see the Consumer Credit Act 1974 s 83(2)); (2) any warrant issued by or on behalf of the Director of Savings for the payment of a sum of money; (3) any document not mentioned in the list which is intended to enable a person to obtain through a banker payment of any sum mentioned in the document: see the Decimal Currency Act 1969 s 3(3) (as so amended).

10 See *ibid* s 3(1), (3) (as amended: see note 9 *supra*).

11 See *ibid* s 5(1).

12 See *ibid* ss 5(3), 6(1); and INDUSTRIAL ASSURANCE vol 24 (Reissue) PARA 209.

13 See *ibid* s 5(3).

14 See *ibid* ss 5(2), 16(1).

15 See *ibid* s 16(1); and the Decimal Currency (End of Transitional Period) Order 1971, SI 1971/1123.

16 See the Decimal Currency Act 1969 ss 9, s 16(1).

17 See the Marine Insurance Act 1906 s 30, Sch 1; and INSURANCE vol 25 (2003 Reissue) PARA 225.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/172. Technical words construed in technical sense.

## 172. Technical words construed in technical sense.

Where technical words occur in a document, whether they are technical scientific or technical legal terms, it is assumed that they are used in their technical sense, and prima facie this is the meaning which such words must bear<sup>1</sup>; but paramount regard must be had to the meaning and intention of the maker of the document, in preference to the technical meaning. Hence the technical meaning of legal terms will give way to the popular meaning or one of several popular meanings if an intention to this effect is manifested by a consideration of the text of the entire instrument and such extrinsic evidence as is admissible<sup>2</sup>. Technical words of limitation, however, will have their strict legal effect<sup>3</sup>. A force majeure clause should be construed in every case with a close attention to the words which precede and follow it, and with a due regard to the nature and terms of the contract<sup>4</sup>.

1 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 525, HL, per Coleridge J; *Leach v Jay* (1878) 9 ChD 42, CA; *Holt & Co v Collyer* (1881) 16 ChD 718; *Laird v Briggs* (1881) 19 ChD 22 at 34, CA, per Jessel MR; *IDC Group Ltd v Clark* [1992] 1 EGLR 187, [1992] 08 EG 108 ('licence' in professionally drawn document construed as a personal licence, not an easement). See also *Holloway v Holloway* (1800) 5 Ves 399 at 401; and cf *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 877 (technical words in wills). 'I do not believe that there is a rebuttable presumption that words in a patent specification that can have a technical meaning do have that technical meaning. The court is entitled to hear evidence as to the meaning of technical words and thereafter must decide the meaning from the context in which they are used': *Hoechst Celanese Corp v BP Chemicals Ltd* [1999] FSR 319 at 326-327, CA, per Aldous LJ. See also WILLS vol 50 (2005 Reissue) PARAS 536, 577 et seq. As to admitting evidence of technical meaning see PARA 201 post.

As to the construction of contractual documents generally see PARA 164 ante.

2 See *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 92 per Plumer MR; *Leach v Jay* (1878) 9 ChD 42, CA; *Holt & Co v Collyer* (1881) 16 ChD 718; *Sydall v Castings Ltd* [1967] 1 QB 302 at 314, [1966] 3 All ER 770 at 774, CA, per Diplock LJ ('the phrase 'legal jargon', however, does contain a reminder that non-lawyers are unfamiliar with the meanings which lawyers attach to particular 'terms of art', and that where a word or phrase which is a 'term of art' is used by an author who is not a lawyer, particularly in a document which he does not anticipate may have to be construed by a lawyer, he may have meant by it something different from its meaning when used by a lawyer as a term of art'). See further PARA 174 post; and cf *Re Jackson, Beattie v Murphy* [1933] Ch 237 (as to wills); *Hill v Grange* (1555) 1 Plowd 164 at 170 ('it is the office of judges to take and expound the words which common people use to express their meaning according to their meaning'). See also *Tester v Bisley* (1948) 64 TLR 184 (on appeal [1948] WN 441, CA) (date of end of war 'fixed' by Prime Minister's statement in House of Commons). As to the effect of contracts or leases for the duration of the war see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 238.

3 See *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 93. Occasionally the legal effect of limitations to trustees has been altered to suit the general intention of the deed. Thus a limitation to trustees and their heirs has been cut down to an estate for the life of another: *Doe d Compere v Hicks* (1797) 7 Term Rep 433; *Curtis v Price* (1805) 12 Ves 89 at 100; *Beaumont v Marquis of Salisbury* (1854) 19 Beav 198. But, in general, legal limitations, and equitable limitations under an executed trust (*Re Whiston's Settlement, Lovatt v Williamson* [1894] 1 Ch 661), are left to their strict effect (*Re Bostock's Settlement, Norrish v Bostock* [1921] 2 Ch 469, CA). Where strict conveyancing language is not employed, it is sufficient that the instrument should disclose a clear intention: *Re Arden, Short v Camm* [1935] Ch 326 at 333 per Clauson J. A conveyance of freehold land without words of limitation now passes to the grantee the whole interest which the grantor had power to convey: see PARA 242 note 6 post. A deed may itself afford sufficient evidence of the intention of the parties to enable it to be rectified: *Banks v Ripley* [1940] Ch 719, [1940] 3 All ER 49; and see MISTAKE vol 77 (2010) PARA 58. In a will greater latitude is allowed, the testator being assumed to have acted without legal advice: *Colmore v Tyndall* (1828) 2 Y & J 605 at 622, Ex Ch; *Lewis v Rees* (1856) 3 K & J 132. Under the present law the only legal limitations are in fee simple and for a term of years absolute: see the Law of Property Act 1925 s 1(1).

4     *Lebeaupin v R Crispin & Co* [1920] 2 KB 714 at 720. It seems that a contract will be void if the words of the force majeure clause are so vague and uncertain as to be incapable of any precise meaning (*British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 All ER 94, [1953] 1 WLR 280); but see the remarks of Denning LJ in *Nicolene Ltd v Simmonds* [1953] 1 QB 543 at 552, [1953] 1 All ER 822 at 825-826, CA. See CONTRACT vol 9(1) (Reissue) PARA 906.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/173. Local or class usage: foreign words.

**173. Local or class usage: foreign words.**

Where it appears that a word or phrase has a special meaning in the district in which the person using it resides, or among the class to which he belongs, so that in using it he probably used it in this special sense, then such special meaning takes the place of the ordinary meaning for the purpose of construing the document, and is the meaning which prima facie the word or phrase must bear<sup>1</sup>. For a special meaning of this nature to be ascribed to language, it must be a well known peculiar idiomatic meaning in the particular country in which the person using the word was dwelling, or in the particular society of which he formed a member<sup>2</sup>.

Where a document is in a foreign language, a translation must be obtained<sup>3</sup>.

<sup>1</sup> *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555, HL, per Parke B; and see *Barksdale v Morgan* (1693) 4 Mod Rep 185 at 186.

As to the construction of contractual documents generally see PARA 164 ante.

<sup>2</sup> *Shore v Wilson* (1842) 9 Cl & Fin 355 at 567, HL, per Tindal CJ. See also *Rosin and Turpentine Import Co Ltd v Jacob & Sons Ltd* (1909) 101 LT 56 at 59, CA, per Farwell LJ; affd (1910) 102 LT 81, HL. As to evidence of local or class usage see further PARA 203 post.

<sup>3</sup> See PARA 201 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/174. Further examples of exclusion of ordinary meaning.

#### **174. Further examples of exclusion of ordinary meaning.**

The ordinary meaning or technical meaning of the words of an instrument may be excluded, and a special meaning substituted, where this is necessitated by the subject matter or context of the instrument<sup>1</sup>, or by the external circumstances at the date of the instrument in regard to which it was to operate<sup>2</sup>. Thus, as to subject matter, an instrument dealing with mercantile matters or with insurance is construed in accordance with the meaning placed on its words by persons conversant with the business to which it relates<sup>3</sup>, and not in accordance with the meaning placed on it by men of science<sup>4</sup>; as to the context, this may show that a particular word, such as 'month', is used, not in its technical legal sense, but in a special sense<sup>5</sup>.

A similar effect may be produced by the external circumstances, so that if the words, taken in the ordinary or technical sense, have no reasonable application in relation to those circumstances, another sense may be substituted. Thus 'children', which until the Family Law Reform Act 1969 was treated in instruments disposing of property as a technical legal term meaning legitimate children<sup>6</sup>, was construed as meaning illegitimate children if there were no legitimate children to whom the expression could refer<sup>7</sup>. In general, if the surrounding circumstances at the date of the instrument show that the parties intended to use a word, not in its primary or strict sense, but in some secondary meaning, the court may construe it from those circumstances, according to the intention of the parties<sup>8</sup>.

1 See *Doe d Freeland v Burt* (1787) 1 Term Rep 701 at 703. An instrument, whatever its nature, is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense: *Robertson v French* (1803) 4 East 130 at 135 per Lord Ellenborough CJ, quoted in *Carr v Montefiore* (1864) 5 B & S 408 at 428, Ex Ch, per Erle CJ; *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499 at 501, CA, per Bowen LJ; *Glynn v Margetson & Co* [1893] AC 351 at 357-358, HL, per Lord Halsbury LC; and cf *Mallan v May* (1844) 13 M & W 511 at 517 per Pollock CB; *Bruner v Moore* [1904] 1 Ch 305 at 310 per Farwell J. See also *Butterley Co Ltd v New Hucknall Colliery Co Ltd* [1909] 1 Ch 37, CA (affd [1910] AC 381, HL); *Jones Construction Co v Alliance Assurance Co Ltd* [1961] 1 Lloyd's Rep 121, CA. See further *Earl of Lonsdale v A-G* [1982] 3 All ER 579, [1982] 1 WLR 887 (whether grant of 'mines and minerals' extended to oil and natural gas); and PARAS 164, 169-170 ante.

As to the construction of contractual documents generally see PARA 164 ante.

2 The primary meaning must be taken if that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing; by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable that the primary meaning is what the writer should have intended; it is enough if these circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning: see *Shore v Wilson* (1842) 9 Cl & Fin 355 at 525, HL, per Coleridge J; *Smith v Doe d Jersey* (1821) 2 Brod & Bing 473 at 550, 602.

3 'A grant of 'mines and minerals' is a question of fact 'what these words meant in the vernacular of the mining world, and landowners,' at the time when they were used in the instrument': *Glasgow Corp'n v Farie* (1888) 13 App Cas 657 at 669, HL, per Lord Halsbury LC. See also *Southland Frozen Meat and Produce Export Co Ltd v Nelson Bros Ltd* [1898] AC 442 at 444, PC. In effect this is the same as the rule set out in para 173 ante, but the fact of the instrument being a mercantile instrument shows at once that the special sense is to be taken, if any such has been affixed to the terms by mercantile usage: see PARA 203 post.

4 *Moody v Surridge* (1798) 2 Esp 633 (corn held to include malt); *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499, CA (iron held to include steel); *Borys v Canadian Pacific Rly Co* [1953] AC 217 at 223,



[1953] 1 All ER 451 at 455, PC (petroleum held to include gas in solution in the liquid). However, the meaning may vary according to the circumstances in which the word is used: *Borys v Canadian Pacific Rly Co* supra at 223 and 455. See also PARA 239 post; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1626.

5 In instruments executed since 1925, unless the context otherwise requires, 'month' prima facie means lunar month, but it may be shown that having regard to the context it means calendar month: *Lang v Gale* (1813) 1 M & S 111; *R v Chawton Inhabitants* (1841) 1 QB 247; and see *Simpson v Margitson* (1847) 11 QB 23; *Bruner v Moore* [1904] 1 Ch 305. 'Minerals' may be restricted by the context to mean certain minerals only: *Hext v Gill* (1872) 7 Ch App 699 at 712; *Tucker v Linger* (1882) 21 ChD 18 at 36, CA. 'Appertaining' to a messuage may be construed in its popular sense of 'usually occupied with', and not in its strict legal sense: see *Hill v Grange* (1555) 1 Plowd 164 at 170. As to modifying the language so as to carry out the general intention appearing from the instrument see generally *St John, Hampstead Vestry v Cotton* (1886) 12 App Cas 1 at 6, HL, per Lord Halsbury LC. A special meaning prima facie assigned to a word is also capable of being varied by the context or external circumstances; but this is unlikely to occur.

6 *Wilkinson v Adam* (1813) 1 Ves & B 422 at 462 per Lord Eldon LC (on appeal (1823) 12 Price 470, HL); *Hill v Crook* (1873) LR 6 HL 265. As to the meaning of 'child', and the effect of adoption, see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 3, 129 et seq. As to the former restriction of the meaning of 'descendants' to those tracing descent exclusively through legitimate relationship see *Sydall v Castings Ltd* [1967] 1 QB 302, [1966] 3 All ER 770, CA. As to the construction of words of relationship see the Family Law Reform Act 1987 s 1 (as amended); and see PARA 171 ante.

7 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 513, HL, per Erskine J; *Hill v Crook* (1873) LR 6 HL 265 at 282; *Monypenny v Monypenny* (1858) 4 K & J 174 at 182 (on appeal (1861) 9 HL Cas 114). In this connection there is no ground for drawing a distinction between a deed and a will: see *Ebbern v Fowler* [1909] 1 Ch 578 at 585, CA, per Cozens-Hardy MR. As regards wills see *Hill v Crook* (1873) LR 6 HL 265 at 282 per Lord Cairns LC; and WILLS vol 50 (2005 Reissue) PARAS 516, 638-642. 'Family' may be shown to mean relatives other than children: see *Re Terry's Will* (1854) 19 Beav 580; *Pigg v Clarke* (1876) 3 ChD 672.

8 *Simpson v Margitson* (1847) 11 QB 23 at 31. Thus the surrounding circumstances may show that 'your having this day advanced' in a deed does not mean that the advance was prior to the execution of the deed: *Goldshede v Swan* (1847) 1 Exch 154. A direction to the sheriff to withdraw from possession of goods, 'the goods having been claimed', has been held to be confined to part of the goods, on evidence that only that part had been claimed: *Walker v Hunter* (1845) 2 CB 324. As to what is meant by 'London' see *Beckford v Crutwell* (1832) 1 Mood & R 187; and cf *Mallan v May* (1844) 13 M & W 511. For an instance of the ordinary meaning of 'heretofore' being excluded see *Roe v Siddons* (1888) 22 QBD 224, CA.

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### **175. Instrument construed as whole.**

It is a rule of construction applicable to all written instruments<sup>1</sup> that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses<sup>2</sup>, and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible<sup>3</sup>. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree<sup>4</sup>. Effect must, as far as possible, be given to every word and every clause<sup>5</sup>.

However, the argument from redundancy, namely that the parties are presumed not to say anything unnecessarily, is seldom an entirely secure one<sup>6</sup>. More weight should be attached to differences in wording of individual parts of a document where the whole document has been drafted by one hand on one occasion than where the document has been added to piecemeal over a period of years<sup>7</sup>. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors<sup>8</sup>.

It has been said that the court in a case of a patent specification (though the dictum may well have a more general application) must adopt 'a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are so often tempted by their training to indulge'<sup>9</sup>. The fact that a particular construction leads to a very unreasonable result is a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it<sup>10</sup>. However, this rule of thumb has its limits. The task of the court is to discover what the parties meant from what they have said. To force upon the words a meaning which they cannot fairly bear would be to substitute for the bargain actually made one which the court believes could better have been made. This would be an illegitimate role for the court to adopt<sup>11</sup>.

When a contract is to be ascertained from a series of letters or documents the whole of the correspondence must be looked at and, although two letters in the course of that correspondence may appear to contain a completed contract, the court will not hold the contract to be complete where subsequent letters show that certain terms had not been agreed<sup>12</sup>. When, however, a contract has in fact been completed and reduced to writing the court is not entitled to consider antecedent acts or correspondence, or to look at words deleted before the conclusion of the contract, in order to ascertain the meaning of the contract in writing finally agreed upon<sup>13</sup>.

1 *Re Jodrell, Jodrell v Seale* (1890) 44 ChD 590 at 605, CA, per Lord Halsbury LC (affd sub nom *Seale-Hayne v Jodrell* [1891] AC 304, HL); *Crumpe v Crumpe* [1900] AC 127 at 131, HL, per Lord Halsbury LC. As to guarantees see eg *Lord Arlington v Merricke* (1672) 2 Saund 403, 411; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq.

As to the construction of contractual documents generally see PARA 164 ante.

2 'The construction must be on the entire deed': *Shep Touch* 87; *Throckmerton v Tracy* (1555) 1 Plowd 145 at 161; and see *Shore v Wilson* (1842) 9 CI & Fin 355 at 511, HL, per Erskine J. 'To pronounce on the meaning of a detached part or extract from an instrument, if relating to the same subject, is contrary to every principle of correct interpretation': *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 89 per Plumer MR; *Hume v Rundell* (1824) 2 Sim & St 174 at 177 per Leach V-C. See also *Barton v Fitzgerald* (1812) 15 East 530; *Sicklemore v Thistleton* (1817) 6 M & S 9; *Elderslie Steamship Co v Borthwick* [1905] AC 93, HL; *National*

*Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; *Hulbert v Long* (1621) Cro Jac 607; *Cromwell v Grunsden* (1698) 2 Salk 462; *Coles v Hulme* (1828) 8 B & C 568; *Bickmore v Dimmer* [1903] 1 Ch 158, CA; *Maritime et Commerciale of Geneva SA v Anglo-Iranian Oil Co Ltd* [1954] 1 All ER 529 at 531-532, [1954] 1 WLR 492 at 495-496, CA; *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd* [1969] 3 All ER 1441 at 1444, [1970] 1 WLR 52 at 55 per Foster J; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 384, [1996] 3 All ER 46 at 51, HL, per Lord Mustill ('the words must be set in the landscape of the instrument as a whole'); and see *Hulbert v Long* (1621) Cro Jac 607 (bonds); *Holmes v Ivy* (1678) 2 Show 15 (where a condition for the delivery of 35,000 tiles, to the value of £144, at 15s 6d per thousand, was held good for £144 although the number of tiles at the price mentioned did not amount to that sum); *Cromwell v Grunsden* (1698) 2 Salk 462; *Bache v Proctor* (1780) 1 Doug KB 382 (where the condition was that the obligor should render a fair and just account in writing of all sums received and it was held that neglect to pay over such sums was a breach of the condition); *Coles v Hulme* (1828) 8 B & C 568; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA.

3 *North Eastern Rly Co v Lord Hastings* [1900] AC 260 at 267, HL, per Lord Davey; *Chamber Colliery Co Ltd v Twyerould* (1893) [1915] 1 Ch 268n at 272, HL, per Lord Watson; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL. 'The sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et consequentibus; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done': *Barton v Fitzgerald* (1812) 15 East 530 at 541 per Lord Ellenborough CJ. See also *Sicklemore v Thistleton* (1817) 6 M & S 9 at 12 per Lord Ellenborough CJ; and cf *Shelley's Case* (1581) 1 Co Rep 93b at 95b. It has been said that where there is an ambiguity a contract should not be construed in such a way as to bar a legitimate claim: *Bunge SA v Deutsche Conti-Handels-Gesellschaft MbH (No 2)* [1980] 1 Lloyd's Rep 352 at 358 per Donaldson J; and see PARA 208 post.

4 *Nokes' Case* (1599) 4 Co Rep 80b at 81a. 'An instrument must not be construed in such a way that one part will contradict another part': *Re Bedson's Trusts* (1885) 28 ChD 523 at 525, CA, per Brett MR.

5 See *Shelley's Case* (1581) 1 Co Rep 93b at 95b; *Butler v Duncomb* (1718) 1 P Wms 448 at 457 per Parker LC ('it is a rule in law and equity so to construe the whole deed or will, as that every clause should have its effect'). 'One leans towards treating words as adding something, rather than as mere surplusage': *Maritime et Commerciale of Geneva SA v Anglo-Iranian Oil Co Ltd* [1954] 1 All ER 529 at 531, [1954] 1 WLR 492 at 495, CA, per Somervell LJ.

6 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 274, [1998] 2 All ER 778 at 784, HL, per Lord Hoffmann.

7 *Tom Walkinshaw Racing Ltd v RAC Motorsports Racing Ltd* (1985) Times, 12 October.

8 *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 274, [1998] 2 All ER 778 at 784, HL, per Lord Hoffmann.

9 *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 at 243, HL, per Lord Diplock, cited in *Glaverbel SA v British Coal Corp* [1995] FSR 254 at 264, [1995] RPC 255 at 269, CA, per Staughton LJ.

10 *L Schüler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251, [1973] 2 All ER 39 at 45, HL, per Lord Reid.

11 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 388, [1996] 3 All ER 46 at 54, HL, per Lord Mustill.

12 *Hussey v Home-Payne* (1879) 4 App Cas 311, HL. See, however, the explanation of this case in *Bolton Partners v Lambert* (1889) 41 ChD 295 at 306, CA; *Bristol, Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616. Where two principals enter into a contract on the face of which no intervention by an agent appears, the court will be slow to import into such a contract a condition contained in a covering letter addressed by a principal to the agent of the other party: *Maconchy v Trower* [1894] 2 IR 663 at 668, HL. See also CONTRACT vol 9(1) (Reissue) PARA 667 et seq.

13 *Inglis v John Buttery & Co* (1878) 3 App Cas 552, HL; *Leggott v Barrett* (1880) 15 ChD 306, CA; *Lee v Alexander* (1883) 8 App Cas 853, HL; *Bromley v Johnson* (1862) 10 WR 303; *Brady v Oastler* (1864) 3 H & C 112; *Emery v Party* (1867) 17 LT 152; *National Bank of Australasia v Falkingham & Sons* [1902] AC 585 at 591, PC; *Re Duncan and Pryce* [1913] WN 117, DC; *Millbourn v Lyons* [1914] 2 Ch 231, CA; *Taylor v John Lewis Ltd* 1927 SC 891, Ct of Sess; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 at 140-141, [1958] 2 All ER 733 at 739-740. In commercial contracts, words struck out may perhaps be looked at if what remains is ambiguous and, where a clause is struck out of a printed form, there is a presumption that the meaning of other clauses not struck out was not meant to be altered: *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1959] 1 QB 498, [1959] 1 All ER 502 (revsd on other grounds [1960] 2 QB 49, [1960] 1 All ER 759, CA); and see *Baumvoll Manufactur von Scheibler v Gilchrest & Co* [1892] 1 QB 253 at 256, CA; *Caffin v Aldridge* [1895] 2 QB 648 at 650, CA; *Heimdal Akt v Russian Wood Agency Ltd* (1933) 46 Ll L Rep 1 at 6, CA; but see *Lyderhorn Sailing Ship*

*Co Ltd v Duncan Fox & Co* [1909] 2 KB 929 at 941, CA; *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175 at 185, HL; *MA Sassoon & Sons Ltd v International Banking Corp* [1927] AC 711 at 721, PC. Acts done after an agreement may be material as evidence of facts existing at the time of the agreement, and therefore relevant to its interpretation as part of the surrounding circumstances, but are not admissible to construe the agreement itself: *Monro v Taylor* (1848) 8 Hare 51 at 56; affd (1852) 3 Mac & G 713. If, nevertheless, the instrument is ambiguous, evidence of user under it may in some cases be given to show the sense in which the language was used: *Watcham v A-G of East Africa Protectorate* [1919] AC 533, PC, explained in *L Schüler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL. See also PARAS 187 note 4, 206-207 post.

## UPDATE

### 175 Instrument construed as whole

NOTE 2--Where a contract or deed incorporates the provisions of a statutory provision, there is no presumption either way as to whether the reference is to the law for the time being in force: *William Hare Ltd v Shepherd Construction Ltd* [2009] EWHC 1603 (TCC), (2009) 125 ConLR 123.

NOTE 5--See also *Bindra v Chopra* [2008] EWHC 1715 (Ch), [2008] 3 FCR 341.

NOTE 13--See also *Mopani Copper Mines plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), [2008] 2 All ER (Comm) 976 (deleted words admissible to ascertain what parties agreed had not yet been agreed).

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### 176. Several instruments.

When a single transaction is carried into effect by several instruments, they are treated as one instrument, and they must all be read together for the purpose of ascertaining the intention of the parties; this is so whether the instruments are actually contemporaneous, that is all executed at the same time, or are executed within so short an interval that the court comes to the conclusion that they in fact represent a single transaction<sup>1</sup>. Where one instrument alone is not effectual to accomplish the object contemplated, such as the execution of a power, it may be supplemented by another instrument<sup>2</sup>, provided the two instruments are intended to operate together<sup>3</sup>. Where two instruments relating to the same matter are executed on the same day, the court may inquire which was executed first, but if there is anything in the deeds themselves to show an intention, either that they are to take effect simultaneously or even that the later deed is to take effect in priority to the earlier, they will be presumed to have been executed in the order necessary to give effect to the manifest intention of the parties<sup>4</sup>.

1 *Smith v Chadwick* (1882) 20 ChD 27 at 62-63, CA, per Jessel MR (affd (1884) 9 App Cas 187, HL); and see *Harman v Richards* (1852) 10 Hare 81; *Hopgood v Ernest* (1865) 3 De GJ & Sm 116. This case frequently occurred under the old law where conveyancing transactions were carried out by agreements followed by fine or recovery: see *Lord Cromwell's Case* (1601) 2 Co Rep 69b at 76a; *Havergil v Hare* (1616) 3 Bulst 250 at 256; *Ferrers v Fermor* (1622) Cro Jac 643 (where a bargain and sale, fine, and recovery, were treated as one assurance, so that a term which was merged by the bargain and sale and fine, in consequence of the conveyance thereby effected to the lessee, was revived upon the lessee suffering a recovery to the use of a third person); and cf *Selwyn v Selwyn* (1761) 2 Burr 1131 at 1134-1135; *Duke of Bolton v Williams* (1793) 2 Ves 138 at 141, 154-155 (where all the instruments securing an annuity were held to make but one assurance); *Harrison v Mexican Rly Co* (1875) LR 19 Eq 358; *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd* [1969] 3 All ER 1441, [1970] 1 WLR 52 (where, applying the Law of Property Act 1925 s 58 (see PARA 217 post), a lease described as supplemental to another lease was read together with it). See, however, *White v Taylor (No 2)* [1969] 1 Ch 160 at 180, [1968] 1 All ER 1015 at 1025 per Buckley J; and PARA 187 post. It appears also that one document, or a part thereof, may be incorporated in another, although the first document has, of itself, no legal effect: see *Akt Ocean v B Harding & Sons* [1928] 2 KB 371 at 393, CA.

As to the construction of contractual documents generally see PARA 164 ante.

2 *Earl of Leicester's Case* (1675) 1 Vent 278.

3 *Hawkins v Kemp* (1803) 3 East 410.

4 *Taylor d Atkins v Horde* (1757) 1 Burr 60 at 106 per Lord Mansfield CJ (affd (1758) 6 Bro Parl Cas 633, HL); *Gartside v Silkstone and Dodworth Coal and Iron Co* (1882) 21 ChD 762 at 767 per Fry J.

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### 177. Intention to be given effect.

If the intention of the parties can be ascertained from the written instrument, the court will give effect to that intention notwithstanding ambiguities in the words used or defects in the operation of the instrument. This is expressed by the maxim 'verba ita sunt intelligenda ut res magis valeat quam pereat'<sup>1</sup>, or by the wholly English paraphrase: 'a deed shall never be void where the words may be applied to any intent to make it good'<sup>2</sup>. Hence, where words are capable of two meanings, the object with which they were inserted may be looked at in order to arrive at the sense in which they were used<sup>3</sup>, and where one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the court will give effect to the apparent intention, provided it can do so without violating any of the established rules of construction<sup>4</sup>. Similarly, the court leans to an interpretation which will effectuate rather than one which will invalidate an instrument<sup>5</sup>, and, in construing two contemporaneous documents, to a construction which will reconcile them rather than one which will render them inconsistent<sup>6</sup>.

Where the deed is incapable of operating in the mode expressed, it will, if possible, be allowed to operate in some other way having a similar result<sup>7</sup>. A deed intended to take effect as a grant may operate as such, although it does not contain appropriate words of conveyance<sup>8</sup>.

In order to give effect to a contract according to what appears to have been the intention of the parties, the court will in certain cases imply a term or condition or a qualification of a clause which is not inconsistent with the general tenor of the document<sup>9</sup>, but where the intention of the parties is not sufficiently clear the court will not make a contract for them in order to prevent the whole agreement from being void on the ground of uncertainty or otherwise<sup>10</sup>.

1 'A rule of common law and common sense': *Langston v Langston* (1834) 2 Cl & Fin 194 at 243, HL, per Lord Brougham LC. 'And yet no well advised man will trust to such deeds, which the law by construction maketh good, *ut res magis valeat*; but when form and substance concur, then is the deed fair and absolutely good': Co Litt 7a. As to supplying necessary words see PARA 210 note 10 post.

See generally para 164 ante.

2 *Throckmerton v Tracy* (1855) 1 Plowd 145 at 160. 'In conveyances we are to respect two things, the form and effect of it; and in all cases where the form and effect cannot stand together, the form shall be rejected and the effect shall stand': *Brent's Case* (1583) 2 Leon 14 at 17. 'Such a construction ought to be made of deeds that the end and design of deeds should take effect rather than the contrary': *Smith d Dormer v Packhurst* (1742) 3 Atk 135 at 136, HL, per Willes CJ; and see *Rosin and Turpentine Import Co Ltd v Jacob & Sons Ltd* (1909) 101 LT 56 at 59, CA, per Farwell LJ (affd [1910] 102 LT 81, HL); *Butterley Co Ltd v New Hucknall Colliery Co Ltd* [1909] 1 Ch 37 at 46, CA, per Cozens-Hardy MR, and at 52-53 per Farwell LJ (affd [1910] AC 381, HL); *Re Baden's Deed Trusts, Baden v Smith* [1969] 2 Ch 388 at 399-400, [1969] 1 All ER 1016 at 1021, CA, per Harman LJ, and at 402 and 1024 per Karminski LJ (revsd on another point sub nom *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL). See also PARA 216 text and note 4 post.

3 *Moody v Surridge* (1798) 2 Esp 633 at 634, explained in *Hart v Standard Marine Insurance Co* (1889) 22 QBD 499, CA; *M'Cowan v Baine and Johnston, The Niobe* [1891] AC 401 at 408, HL. The domicile of the parties and place of execution may also become material: *Marquis of Lansdowne v Marchioness of Lansdowne* (1820) 2 Bli 60, HL; and see *Brown v Fletcher* (1876) 35 LT 165. See *College of Credit Ltd v National Guarantee Corp'n Ltd* [2004] EWHC 978 (Comm), [2004] 2 All ER (Comm) 409 (intention of parties in use of term 'advance'); and see also PARA 170 ante.

4 *Solly v Forbes* (1820) 2 Brod & Bing 38 at 48; *Parkhurst v Smith d Dormer* (1742) Willes 327 at 332, HL; *Hayne v Cummings* (1864) 16 CBNS 421; *Cochran & Son v Leckie's Trustee* (1906) 8 F 975, Ct of Sess. See also *Lively Ltd v City of Munich* [1976] 3 All ER 851, [1976] 1 WLR 1004 (foreign bonds construed so as to give effect to commercial objective of the bonds).

5 *Pugh v Duke of Leeds* (1777) 2 Cowp 714 at 717 per Lord Mansfield LJ; and see *Atkinson v Hutchinson* (1734) 3 P Wms 258 at 260 per Talbot LC, quoted in *Thellusson v Woodford* (1798) 4 Ves 227 at 312; *Stratford v Bosworth* (1813) 2 Ves & B 341; *Solly v Forbes* (1820) 4 Moore CP 448 at 463; *Haigh v Brooks* (1839) 10 Ad & El 309 (affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch); *Wilkinson v Gaston* (1846) 9 QB 137; *Pollock v Stacy* (1847) 9 QB 1033; *Goldshede v Swan* (1847) 1 Exch 154; *Mills v Dunham* [1891] 1 Ch 576 at 590, CA. Thus if one construction makes a contract lawful and another unlawful, the former is preferred: *Lewis v Davison* (1839) 4 M & W 654. Before the court applies this principle and leans to an interpretation which effectuates rather than invalidates an instrument, it must have been left, after using all allowable means for ascertaining the true intention of the parties, in a state of real and persistent uncertainty of mind: *IRC v Williams* [1969] 3 All ER 614 at 618, [1969] 1 WLR 1197 at 1201 per Megarry J; and see *Re Baden's Deed Trusts, Baden v Smith* [1969] 2 Ch 388, [1969] 1 All ER 1016, CA (revsd on another point sub nom *McPhail v Doulton* [1971] AC 424, [1970] 2 All ER 228, HL).

6 If one of such documents is ambiguous and the other clear, then force is given to the one which is clear to interpret the other: *Re Phoenix Bessemer Steel Co* (1875) 44 LJ Ch 683.

7 Deeds operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they operate in that which by law will effect the intention: *Goodtitle d Edwards v Bailey* (1777) 2 Cowp 597 at 600 per Lord Mansfield CJ. A deed that is intended and made to one purpose may enure to another, for if it will not take effect in that way it is intended, it may take effect another way, provided it may have that effect consistently with the intention of the parties: Shep Touch 82.

Recourse was frequently had to this rule under the old law with its diverse and highly technical forms of conveyancing; and a conveyance which was void in its primary form was allowed to take effect, if possible, in some other manner. Thus where a grant, or a release following upon a lease, was void as an attempt to create an estate of freehold in futuro (*Roe d Wilkinson v Tranmarr* (1757) Willes 682; *Doe d Starling v Prince* (1851) 20 LJPC 223), or where a bargain and sale, though duly enrolled, was void for want of a pecuniary consideration (*Crossing v Scudamore* (1674) 1 Vent 137; *Doe d Milburn v Salkeld* (1755) Willes 673 at 676), in any such case, if the conveyance was in favour of a relation by blood or marriage, it might operate as a covenant to stand seised: see notes to *Chester v Willan* (1670) 2 Saund 96; *Marshall v Frank* (1717) Prec Ch 480. Although the conveyance was to trustees, the relationship of the beneficiary to the settlor was sufficient to raise the necessary consideration for a covenant to stand seised: *Doe d Lewis v Davies* (1837) 2 M & W 503 at 516-518.

8 *Shove v Pincke* (1793) 5 Term Rep 124; *Haggerston v Hanbury* (1826) 5 B & C 101; *Doe d Were v Cole* (1827) 7 B & C 243; *Doe d Jones v Williams* (1833) 5 B & Ad 783. So the words 'limit and appoint' may operate as a grant: *MacAndrew v Gallagher* (1874) 8 IR Eq 490. As to deeds which operate as leases see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 198 et seq. As to deeds operating as execution or release of powers see POWERS vol 36(2) (Reissue) PARA 270. As to voluntary settlements see SETTLEMENTS vol 42 (Reissue) PARA 615 et seq.

9 See PARA 181 post.

10 *Mills v Dunham* [1891] 1 Ch 576 at 580, CA. This principle has application chiefly to the case of contracts in restraint of trade, which become entirely void where the restraint is greater than the law allows, unless the agreement itself severs the lawful from unlawful clauses. See also *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775. The court is, however, reluctant to hold void for uncertainty any provision that was intended to have legal effect: *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505. In the case of a provision in a lease or conveyance see *Sheffield City Council v Jackson* [1998] 3 All ER 260 at 268, [1998] 1 WLR 1591 at 1599, CA, per Nourse LJ.

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### **178. Construction against grantor or covenantor.**

If a doubt arises upon the construction of a grant, and the doubt can be removed by construing the deed adversely to the grantor, this will be done<sup>1</sup>. The words of a deed, executed for valuable consideration, are to be construed, as far as they properly may, in favour of the grantee<sup>2</sup>. Where there is a grant and an exception out of it, the exception is taken as inserted for the benefit of the grantor, and is construed in favour of the grantee<sup>3</sup>.

The obligatory part of a bond, being for the benefit of the obligee, is always construed most strongly against the obligor, but the condition<sup>4</sup>, being for the benefit of the obligor, is construed most strongly in his favour<sup>5</sup>.

Exceptions in a contract are as a general rule to be construed, as in a grant, strictly against the party for whose benefit they are inserted on the ground that those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words<sup>6</sup>. General words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his employees unless that is substantially the only scope for the operation of the clause<sup>7</sup>. A clause in a contract exempting a party from liability for the negligence of his employees or agents will not as a rule be extended by implication so as to protect those employees or agents from liability<sup>8</sup>. An exception clause may not on the true construction of the contract give a party protection if he has committed a breach of a fundamental term of the contract<sup>9</sup>.

Where there is a doubt on the construction of a settlement whether a trustee would be exempted from liability for breach of trust by a trustee exemption clause, such doubt should be resolved against the trustee and the clause construed so as not to protect him<sup>10</sup>.

A settlement in which the same person is at once grantor and grantee is construed as if made by a stranger<sup>11</sup>. Similarly, covenants are construed most strongly against the covenantor, and most beneficially in favour of the covenantee<sup>12</sup>.

Generally an instrument must be read most strongly against the party who prepares it and offers it for execution by the other, such as a declaration prepared by an insurance company for signature by an intending insured<sup>13</sup>.

1 It is a maxim of the law that every man's grant is taken most strongly against himself: Co Litt 183a; and see also Co Litt 264b, 265a. 'All the words of a deed shall be taken most strongly against him that doth speak them, and most in advantage of the other party': Shep Touch 87; *Throckmerton v Tracey* (1555) 1 Plowd 145; *Doe d Davies v Williams* (1788) 1 Hy Bl 25. See also *Williams v James* (1867) LR 2 CP 577 at 581 per Willes J; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 149, HL; *Gluckstein v Barnes* [1900] AC 240 at 250, HL, per Lord Macnaghten; *Re Harper (a bankrupt)*, *Harper v O'Reilly* [1998] 3 FCR 475, [1997] 2 FLR 816. It was held by Jessel MR in *Taylor v St Helens Corpn* (1877) 6 ChD 264 at 270, CA, that having regard to the rule laid down by the House of Lords in *Grey v Pearson* (1857) 6 HL Cas 61 (see PARA 169 text and note 2 ante), the maxim that a grant in which there is any obscurity or difficulty must be construed most strongly against the grantor has no application at the present time; but see *Leech v Schweder* (1874) 9 Ch App 465n at 466n per Jessel MR (revsd on other grounds 9 Ch App 463). The rule operates in favour of a lessee: *Justice Windham's Case* (1589) 5 Co Rep 7a; *Seaman's Case* (1610) Godb 166; *Manchester College v Trafford* (1678) 2 Show 31; *Dann v Spurrier* (1803) 3 Bos & P 399 at 403; *Doe d Webb v Dixon* (1807) 9 East 15 at 16. It has been held, too, that a guarantee should be construed strictly against the party executing it (*Hargreave v Smea* (1829) 6 Bing 244), that conditions of sale should be construed strictly against the vendor (*Seaton v Mapp* (1846) 2 Coll 556), and that, generally speaking, where there are several ways of performing a contract, the mode may be adopted which is least profitable to the person complaining of a breach (*Cockburn v Alexander* (1848) 6 CB 791 at 814 per Maule J; *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 293, [1966] 3 All ER 683 at 690, CA, per



Diplock LJ). A clause in an insurance policy excluding liability will be construed against the insurers: *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247, [1953] 2 All ER 1409, CA. As to the contrary rule in the case of Crown grants see PARA 179 post.

As to the construction of contractual documents generally see PARA 164 ante.

2 Co Litt 183a; *Willion v Berkley* (1561) 1 Plowd 223 at 243; *Justice Windham's Case* (1589) 5 Co Rep 7a; *Davenport's Case* (1610) 8 Co Rep 144b; *Re Stroud* (1849) 8 CB 502 at 529 per Wilde CJ; *Johnson v Edgware etc Rly Co* (1866) 35 Beav 480 at 484 per Lord Romilly MR; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 149, HL, per Lord Selborne LC.

3 Shep Touch 100; *Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 207; *Bullen v Denning* (1826) 5 B & C 842 at 847, 850; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523 at 537, CA; *Gruhn v Balgray Investments Ltd* (1963) 107 Sol Jo 112, CA. Where there was a reservation of a new interest, eg an easement, not issuing out of the property conveyed, in a conveyance made before 1926 (at any rate if the reservation was not effected by a grant to uses under the Conveyancing Act 1881 s 62 (repealed)), the reservation had to be made by a regrant or by a conveyance executed by the grantee and treated in relation to the reservation as a regrant, and any such reservation was construed against the person making the regrant. Although the doctrine of fictitious regrant has been abolished (by the Law of Property Act 1925 s 65(1)) this principle of constructing a reservation against the persons supposed to be making the regrant still applies: see *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772, [1975] 1 WLR 468, CA, following *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12 at 24, CA; *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940, Ex Ch.

4 For the meaning of 'obligatory part' and 'condition' of a bond see PARA 91 ante.

5 Shep Touch 375.

6 *Blackett v Royal Exchange Assurance Co* (1832) 2 Cr & J 244 at 251; *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546; *Burton v English* (1883) 12 QBD 218 at 220, 222, CA. See also *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917; *Birrell v Dryer* (1884) 9 App Cas 345, HL; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA; *The Pearlmooor* [1904] P 286; *Price & Co v Union Lighterage Co* [1904] 1 KB 412, CA; *Elderslie Steamship Co v Borthwick* [1905] AC 93, HL; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA; *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73, CA; *Whelan v Leonard* [1917] 2 IR 323, Ir CA; *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA; *J Gordon Alison & Co v Wallsend Slipway and Engineering Co* (1927) 43 TLR 323, CA; *John Lee & Son (Grantham) Ltd v Rly Executive* [1949] 2 All ER 581, CA; *Compania Naviera Aeolus SA v Union of India* [1964] AC 868, [1962] 3 All ER 670, HL (once a vessel is on demurrage no exception clause prevents demurrage continuing unless it is clearly worded); *John Carter (Fine Worsted) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113, CA; *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645, CA; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215, CA.

7 *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA; *AE Farr Ltd v Admiralty* [1953] 2 All ER 512 at 513, [1953] 1 WLR 965 at 967; *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210 at 211, [1954] 1 WLR 459 at 461, CA, per Somervell LJ; and see BAILMENT vol 3(1) (2005 Reissue) PARA 40; CARRIAGE AND CARRIERS vol 7 (2008) PARAS 79-85; CONTRACT vol 9(1) (Reissue) PARA 797 et seq. As to negligence clauses in general see NEGLIGENCE; and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 280.

8 *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA (contract for the carriage of a passenger by sea). One exception which exists is in the case of a contract for the carriage of goods eg a bill of lading; an exemption clause in such a contract will, it appears, enure for the benefit of all engaged in carrying out the contract: see *Elder, Dempster & Co v Paterson, Zochonis & Co* [1924] AC 522, HL, explained and distinguished in *Adler v Dickson* [1955] 1 QB 158 at 181-184, [1954] 3 All ER 397 at 400-402, CA, per Denning LJ, at 189-195 and 405-408 per Jenkins LJ, and at 198-200 and 411-412 per Morris LJ. See also CARRIAGE AND CARRIERS vol 7 (2008) PARAS 280, 628. In *Murfin v United Steel Companies Ltd* [1957] 1 All ER 23, [1957] 1 WLR 104, CA, the term negligence was not, on the true construction of an indemnity clause, found to include breach of statutory duty.

As to exclusion clauses and third parties generally see CONTRACT vol 9(1) (Reissue) PARA 797 et seq.

9 *Atlantic Shipping and Trading Co v Louis Dreyfus & Co* [1922] 2 AC 250 at 260, HL, per Lord Sumner; *Smeaton, Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471 at 1473, [1953] 1 WLR 1468 at 1470 per Devlin J; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL. A clause requiring the claim to be brought within a specified period is an exception for this purpose: *Smeaton, Hanscomb & Co Ltd v Sassoon I Setty Son & Co* supra at 1473 and 1470. A fundamental term is something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates: *Smeaton, Hanscomb & Co Ltd v Sassoon I Setty Son & Co* supra at 1473 and 1470. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 79 et seq.

10 *Wight v Olswang* (1998) Times, 17 September; revsd on a different point (1999) Times, 18 May, CA.

11 *Vincent v Spicer* (1856) 22 Beav 380 at 383.

12 *Warde v Warde* (1852) 16 Beav 103 at 105 per Romilly MR. Examples are covenants for title (*Barton v Fitzgerald* (1812) 15 East 530 at 546), or covenants in a lease (*Barrett v Duke of Bedford* (1800) 8 Term Rep 602 at 605; *Webb v Plummer* (1819) 2 B & Ald 746 at 751; *Doe d Sir W Abdy v Stevens* (1832) 3 B & Ad 299 at 303).

13 *Fowkes v Manchester and London Assurance Association* (1863) 3 B & S 917 at 925 per Cockburn CJ. As to exceptions in a bill of lading see *Taylor v Liverpool and Great Western Steam Co* (1874) LR 9 QB 546 at 549 per Lush J; and cf *Birrell v Dryer* (1884) 9 App Cas 345, HL.

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### 179. Qualifications of the rule.

The rule that words are to be interpreted most strongly against him who uses them<sup>1</sup>, expressed in the maxim 'verba fortius accipiuntur contra proferentem', is subject to the general principle that the instrument must be construed in accordance with the expressed intention<sup>2</sup>. The rule does not come into operation until a doubt arises upon the construction of the instrument<sup>3</sup>; nor is it applied when the effect would be to make the grantor's deed work a wrong<sup>4</sup>. Moreover, it is to be applied only when all other rules of construction fail<sup>5</sup>.

In the case of a grant by the Crown the rule is reversed, and the grant is taken most strongly against the grantee and in favour of the Crown<sup>6</sup>, unless the grant is expressed to be made 'of special grace, mere motion, and certain knowledge'<sup>7</sup>.

There is no rule that a contract of guarantee is to be construed with special favour to the guarantor; but a surety is bound only by the strict letter of his engagement<sup>8</sup>.

1 See PARA 178 ante. As to the construction of contractual documents generally see PARA 164 ante.

2 See *Webb v Plummer* (1819) 2 B & Ald 746 at 751 per Holroyd J.

3 See *Rubery v Jervoise* (1786) 1 Term Rep 229 at 234 per Willes J; *Fowle v Welsh* (1822) 1 B & C 29 at 35 per Bayley J; *Williams v James* (1867) LR 2 CP 577 at 581 per Willes J. The rule that, if the words are doubtful, the construction must be most strong against the covenantor is qualified by the rule that effect must be given to every word, and if when this is done the doubt is removed, there is no room for the former rule: *Patching v Dubbins* (1853) Kay 1 at 13-14 per Wood V-C.

4 'It is a general rule that, whensoever the words of a deed, or of the parties without a deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken': Co Litt 42a, b; Shep Touch 88. This rule is superior to the rule that the deed is to be construed most strongly against the grantor: *Rodger v Comptoir d'Escompte de Paris* (1869) LR 2 PC 393 at 406.

5 *Borradaile v Hunter* (1843) 5 Man & G 639; *Lindus v Melrose* (1858) 3 H & N 177 at 182, Ex Ch, per Coleridge J; *Macey v Qazi* (1987) Times, 13 January, CA; and see *Burton v English* (1883) 12 QBD 218 at 220, CA, per Brett MR. In accordance with the rule, the words of a deed inter partes are construed most strongly against the party who is to be regarded as using them: see the argument in *Browning v Beston* (1555) 1 Plowd 131 at 134.

6 *Willion v Berkley* (1561) 1 Plowd 223 at 243; *Viscountess Rhondda's Claim* [1922] 2 AC 339 at 353, HL. The maxim, however, does not override the ordinary rules for ascertaining what is included in the grant: *A-G v Ewelme Hospital* (1853) 17 Beav 366 at 386; *Lord v Sydney City Comrs* (1859) 12 Moo PCC 473 at 497. As to Crown grants generally see *Alton Woods' Case* (1600) 1 Co Rep 40b; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 858 et seq.

7 *Alton Woods' Case* (1600) 1 Co Rep 40b; Com Dig, Grant (G 12); Vin Abr, Prerogative (Ec 3); *Doe d Devine v Wilson* (1855) 10 Moo PCC 502 at 525; contra *R v Capper, Re Bowler* (1817) 5 Price 217 at 260.

8 See *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266 (affd [1932] 1 KB 423, CA), citing *Blest v Brown* (1862) 4 De GF & J 367 at 376. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(1) GENERAL RULES OF INTERPRETATION/180. Party taking advantage of his own wrong.

**180. Party taking advantage of his own wrong.**

Where a claim for breach of contract turns on the construction of a particular clause, a party is not debarred from relying on a construction which would allow him to derive an advantage from a previous breach if no disadvantage is suffered by the other party. The presumption that no man can take advantage of his own wrong does not apply in such circumstances<sup>1</sup>. Whether a clause in an agreement is to be defeated because a party was taking advantage of his own wilful default is essentially a question of construction of the agreement<sup>2</sup>.

1 See *Thornton v Abbey National plc* (1993) Times, 4 March, CA (defendant entitled to replacement vehicle 'at intervals of no more than 30 months'; the replacement was outside that period; the plaintiff claimed he was entitled to further replacement within 30 months of the date when it should have been provided, but the defendant successfully argued that the intervals referred to times between replacements).

As to the construction of contractual documents generally see PARA 164 ante.

2 See *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(2) IMPLICATIONS/181. Implied terms.

## (2) IMPLICATIONS

### 181. Implied terms.

Provisions may be implied in an instrument, and in particular in a contract<sup>1</sup>, on a variety of grounds. With certain exceptions<sup>2</sup>, a provision will be so implied only where the instrument is devoid of any express provision dealing with the matter which is the subject of the implied provision, and the latter must not be inconsistent with, and may be moulded by, the express provisions of the instrument<sup>3</sup>. The cases in which provisions may be implied may be put into a number of overlapping categories. First, where the instrument effects a transaction relating to a particular trade, profession, or branch of commercial or mercantile life or to the letting of land, and notorious usages, reasonable and certain in character but not unlawful, exist either generally throughout the kingdom or in a relevant larger or more local area, the parties will be presumed to be intending to follow and be bound by these usages<sup>4</sup>. Secondly, where it is clearly necessary to imply some unexpressed term in order to give to the transaction effected by the instrument that efficacy which all parties must have intended it to have<sup>5</sup>, a reasonable term will be implied for that purpose, provided that it is clear what term ought to be so implied<sup>6</sup>. Thirdly, implications of particular well-defined terms are made in certain particular transactions by the law merchant or the common law as developed and determined by judicial decisions<sup>7</sup>; many of these detailed particular implied terms originated as usages or terms implied by necessity but are now regarded as part of the general law. Fourthly, terms may be implied by statute<sup>8</sup>; some of these statutory implications are a codification of terms implied previously by judicial decisions.

1 See CONTRACT vol 9(1) (Reissue) PARA 778 et seq. As to the construction of contractual documents generally see PARA 164 ante.

2 See PARA 184 post. In addition, a statute occasionally inserts an implied term which it declares cannot be overridden by the instrument: see eg the Landlord and Tenant Act 1985 ss 8, 11-16 (as amended); the Unfair Contract Terms Act 1977 s 6 (as amended), in relation to certain provisions in the Sale of Goods Act 1979; and the Supply of Goods (Implied Terms) Act 1973. It is also sometimes provided by statute that express terms are not to negative a particular statutory implied term unless inconsistent with it: see eg the Sale of Goods Act 1979 s 55(2) (as amended); the Supply of Goods (Implied Terms) Act 1973 s 12 (as substituted); and SALE OF GOODS AND SUPPLY OF SERVICES.

3 See PARA 182 post.

4 See *Liverpool City Council v Irwin*[1977] AC 239 at 253, [1976] 2 All ER 39 at 43, HL, per Lord Wilberforce; *Baker v Black Sea and Baltic General Insurance Co Ltd*[1998] 2 All ER 833 at 841, [1998] Lloyd's Rep IR 327 at 339, HL, per Lord Lloyd ('it is very common in mercantile contracts, where there is an established market usage, to add a term to an otherwise complete bilateral contract, on the grounds that it is what the parties would unhesitatingly have agreed'). As to the implied term of confidentiality in commercial arbitrations see *Ali Shipping Corpn v Shipyard Trogir*[1998] 2 All ER 136, [1998] 1 Lloyd's Rep 643, CA. See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq. See also AGRICULTURAL LAND vol 1 (2008) PARA 352 et seq.

5 *M'Intyre v Belcher* (1863) 14 CBNS 654; *Saner v Bilton*(1878) 7 ChD 815; *The Moorcock* (1889) 14 PD 64, CA; *Ogdens Ltd v Nelson*[1904] 2 KB 410, CA (affd on other grounds [1905] AC 109, HL); *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*[1918] 1 KB 592 at 605, CA, per Scrutton LJ ('the first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that, it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply

a term which the parties themselves have not expressed.'). *Shirlaw v Southern Foundries (1926) Ltd*[1939] 2 KB 206, [1939] 2 All ER 113, CA; *Kumar v AGF Insurance Ltd*[1998] 4 All ER 788, [1999] Lloyd's Rep IR 147. See further PARAS 183, 251, 253, 255 post; and CONTRACT vol 9(1) (Reissue) PARAS 782-783.

6 *Re Cochrane, Shaw v Cochrane*[1955] Ch 309, [1955] 1 All ER 222; *R v Paddington and St Marylebone Rent Tribunal, ex p Bedrock Investments Ltd*[1947] KB 984 at 990, [1947] 2 All ER 15 at 17, DC, per Lord Goddard CJ (affd [1948] 2 KB 413, [1948] 2 All ER 528, CA), cited with approval in *R v Croydon and District Rent Tribunal, ex p Langford Property Co Ltd*[1948] 1 KB 60, DC; *Penn v Gatenex Co Ltd*[1958] 2 QB 210 at 224, [1958] 1 All ER 712 at 718, CA, per Parker LJ. Where it is necessary to imply a contractual warranty, and there is some choice open as to its terms, the obligation least onerous on the party upon whom it is imposed will be implied: *Compagnie Algerienne De Meunerie v Katana Societa Di Navigazione Marittima SPA*[1959] 1 QB 527 at 540, [1959] 1 All ER 272 at 278 per Diplock J; affd on other grounds [1960] 2 QB 115, [1960] 2 All ER 55, CA.

See also *French v Barclays Bank plc*[1998] IRLR 646, CA (there was implied into a contract of employment a term that the bank would not act so as to destroy the confidence and trust existing as between the bank and its employee; it would be a breach of that term for the bank to insist on a relocation, offer a bridging loan interest free, and then to seek to alter the terms of the loan to the employee's detriment). The court refused, however, to imply a term to keep the structure of a building in repair in *Adami v Lincoln Grange Management Ltd* (1997) 30 HLR 982, [1998] 1 EGLR 58, CA, distinguishing *Barrett v Lounova (1982) Ltd*[1990] 1 QB 348, [1989] 1 All ER 351, CA, as a decision on its special facts.

7 See PARAS 251-256, 259 post; and CONTRACT vol 9(1) (Reissue) PARAS 780-781; CUSTOM AND USAGE vol 12(1) (Reissue) PARA 650 et seq. Many detailed terms are now implied by law in an open contract for sale of land: see *Re Priestley's Contract*[1947] Ch 469, [1947] 1 All ER 716; and SALE OF LAND vol 42 (Reissue) PARAS 38, 338 et seq. The terms to be implied in a contract of employment (in the absence of and subject to any express provision) have been developed and crystallised by the courts: *Lister v Romford Ice and Cold Storage Co Ltd*[1957] AC 555, [1957] 1 All ER 125, HL; and see EMPLOYMENT vol 39 (2009) PARA 90.

8 Eg, in relation to sale of land, see the Law of Property Act 1925 s 45; and the Statutory Form of Conditions of Sale 1925, SR & O 1925/779; and SALE OF LAND vol 42 (Reissue) PARAS 132, 150, 172 (but see *Commission for the New Towns v Cooper (Great Britain) Ltd*[1995] Ch 259, [1995] 2 All ER 929, CA, indicating that it is virtually impossible to create a land contract by correspondence). In relation to conveyances and other assurances of property, see the Law of Property Act 1925 ss 62-63, 77 (as amended), Sch 2 (as amended); para 256 post; and MORTGAGE vol 77 (2010) PARA 194. In relation to tenancies of agricultural land, see the Agricultural Holdings Act 1986 s 7; the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, SI 1973/1473 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 332 et seq. In relation to covenants, see the Law of Property Act 1925 ss 78, 80(1) (as amended); and PARA 256 post. In relation to the powers of trustees, see the Trustee Act 1925; the Trustee Investments Act 1961; and TRUSTS vol 48 (2007 Reissue) PARA 971 et seq. In relation to the sale of goods, see the Sale of Goods Act 1979 ss 10, 12-15 (as amended), Sch 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2004 Reissue) PARA 467. In relation to hire-purchase agreements, see the Supply of Goods (Implied Terms) Act 1973 ss 8-15 (as amended); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq. In relation to partnership, see the Partnership Act 1890 ss 19, 24-25; and PARTNERSHIP.

## UPDATE

### 181 Implied terms

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(2) IMPLICATIONS/182. Effect of express provision.

## **182. Effect of express provision.**

An express provision in an instrument excludes any stipulation which would otherwise be implied with regard to the same subject matter. The rule is expressed in the maxim 'expressum facit cessare tacitum'<sup>1</sup>, and is based upon the presumption that the parties, having expressed some, have expressed all the conditions by which they intend to be bound under the instrument in respect of the particular subject matter<sup>2</sup>.

<sup>1</sup> See Co Litt 183b, 210a. As to the situation where the express clause is exactly that implied by the law see PARA 184 post.

As to the construction of contractual documents generally see PARA 164 ante.

<sup>2</sup> *Aspdin v Austin* (1844) 5 QB 671 at 684 per Lord Denman CJ; and see *Rhodes v Forwood* (1876) 1 App Cas 256 at 265, HL. Thus, upon an advance on mortgage, if the mortgage deed contains no covenant for payment, a personal obligation to repay the money is implied; but if the deed contains a covenant for payment out of particular funds, the implication of a personal contract is excluded: *Mathew v Blackmore* (1857) 1 H & N 762 at 771-772. Similarly, upon a letting, an express covenant for quiet enjoyment excludes the covenant which would be implied from the use of the word 'demise', or, without that word, from the mere letting: *Nokes' Case* (1599) 4 Co Rep 80b; *Merrill v Frame* (1812) 4 Taunt 329; *Stannard v Forbes* (1837) 6 Ad & El 572; *Line v Stephenson* (1838) 5 Bing NC 183, Ex Ch; *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA; and see *Markham v Paget* [1908] 1 Ch 697. See also *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 ChD 295 at 308, CA (express grant of appurtenances); and the cases cited in para 251 note 8 post.

## **UPDATE**

### **182 Effect of express provision**

NOTE 2--Where an instrument does not expressly provide for what is to happen when some event occurs, the most usual inference is that nothing is to happen, and any loss incurred lies where it falls: *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER 1127.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(2) IMPLICATIONS/183. Effect of express mention of one of several persons or matters.

### **183. Effect of express mention of one of several persons or matters.**

The principle that the express mention in a provision of one only of several related things, persons or matters indicates that the provision is not intended to include the other or others, is expressed in the maxim 'expressio unius est exclusio alterius'<sup>1</sup>. Thus where an instrument authorises a particular mode of selling or otherwise dealing with property, this excludes any other mode of dealing with it for the same purpose<sup>2</sup>; and generally, where authority to do an act is given upon a defined condition, the expression of that condition excludes the doing of the act under other circumstances than those so defined<sup>3</sup>.

The maxim, however, must be applied with caution. The failure to make the provision expressed complete may be accidental<sup>4</sup>; and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, will lead to inconsistency or injustice<sup>5</sup>. It should only be applied when the instrument, on the face of it, apparently contains all the terms which the parties have agreed upon<sup>6</sup>.

In some respects the maxim is the converse of the principles upon which words may be supplied in order to correct clearly inadvertent omissions<sup>7</sup> or upon which terms may be implied if necessary and obviously intended to give efficacy to the instrument<sup>8</sup>. These principles override the maxim because the instrument does not, where they have effect, contain on its face all the terms which the parties have intended.

1 See Co Litt 210a. This maxim has been applied also to statutes: see STATUTES vol 44(1) (Reissue) PARA 1494. As to the construction of contractual documents generally see PARA 164 ante.

2 *Blackburn v Flavelle* (1881) 6 App Cas 628 at 634, PC. So, in a conveyance of two distinct buildings, the express mention of the fixtures in one of them has been held to exclude those in the other: see *Hare v Horton* (1833) 5 B & Ad 715 at 729.

3 *North Stafford Steel etc Co v Ward* (1868) LR 3 Exch 172 at 177, Ex Ch, per Willes J; and cf *R v Palfrey* [1970] 2 All ER 12 at 15-16 [1970] 1 WLR 416 at 421-422, CA, per Winn LJ.

4 *Colquhoun v Brooks* (1887) 19 QBD 400 at 406 per Wills J, suggesting that the omission may arise from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention (on appeal (1888) 21 QBD 52 at 65, CA; (1889) 14 App Cas 493, HL).

5 *Colquhoun v Brooks* (1888) 21 QBD 52 at 65, CA, per Lopes LJ; *Lowe v Dorling & Son* [1906] 2 KB 772 at 785, CA, per Farwell LJ; *Sampson v Caldow* [1977] 1 EGLR 100; and see *Dean v Wiesengrund* [1955] 2 QB 120 at 137, [1955] 2 All ER 432 at 443, CA, per Morris LJ.

6 This paragraph was cited with approval in *McClelland v Northern Ireland General Health Services Board* [1957] 2 All ER 129 at 138, [1957] 1 WLR 594 at 607, HL, per Lord Keith. See also *Devonald v Rosser & Sons* [1906] 2 KB 728 at 745, CA, per Farwell LJ. In the construction of a contract the maxim is not applicable when the expression is found only in one and not in the other clauses of the same contract: *Wade & Sons Co Ltd v Cockerline & Co* (1905) 53 WR 420, CA. Nor is the maxim appropriate where that which is expressed is introduced by the phrase 'such as' or any other expression indicating that what is expressed is not exhaustive: *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 All ER 69 at 76, [1969] 1 WLR 89 at 98, CA, per Lord Diplock.

7 See PARA 210 post.

8 See PARAS 181 note 5 ante, 251-254 post.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(2) IMPLICATIONS/184. Expression of implied terms has no effect.

#### **184. Expression of implied terms has no effect.**

The expression of a clause which is exactly that implied by the law as the necessary consequence of the contract between the parties has no legal operation; this rule is expressed in the maxim 'expressio eorum quae tacite insunt nihil operatur'<sup>1</sup>. It merely serves to remove any doubt which might arise in the mind of a person unacquainted with the law<sup>2</sup>. Consequently, the express clause does not vary the legal results of the implied clause<sup>3</sup>, nor did it necessitate any additional stamp duty<sup>4</sup>.

The same maxim also expresses a second related principle: where a grant of property confers by implication powers which are essential to its enjoyment, these are not cut down by the express conferment in positive terms of restricted powers to the same effect<sup>5</sup>. Save in this case, an express clause which varies from the implied clause excludes it in accordance with the rule 'expressio unius est exclusio alterius'<sup>6</sup>.

The present rule only deprives the words, thus needlessly introduced, of effect upon their own clause. Nevertheless, though they are superfluous for the immediate purpose of that clause, they may affect the construction of other clauses in the instrument<sup>7</sup>.

1 *Boroughe's Case* (1596) 4 Co Rep 72b at 73b; Co Litt 205a; and see Co Litt 224b. Thus a reservation of rent to a lessor for his life is not varied by the addition of the words 'and his assigns', which are implied: *Sury v Cole (or Brown)* (1625) Lat 44, 255; and see *Wooton v Edwin* (1607) 12 Co Rep 36.

As to the construction of contractual documents generally see PARA 164 ante.

2 It is useful 'to express and declare to laymen which have no knowledge of the law what the law requires in such cases': *Boroughe's Case* (1596) 4 Co Rep 72b at 73b; and see Littleton's Tenures s 331.

3 Eg an express power of distress, provided its terms do not impose requirements other than those of a common law power of distress: *Browne v Dunnery* (1618) Hob 208; and cf *Doe d Scholefield v Alexander* (1814) 2 M & S 525 at 532, where in a proviso for re-entry on default in payment of rent 'being lawfully demanded,' the introduction of these words added nothing to the clause; and see PARA 182 note 2 ante.

4 Thus where a mortgage deed expressly secured expenses which, in the absence of express provision, could have been added to add to the security, the present maxim rendered it unnecessary to increase the stamp duty (since abolished by the Finance Act 1971) so as to cover these expenses: *Doe d Scruton v Snaith* (1832) 8 Bing 146 at 154. See also *Doe d Mercer v Bragg* (1838) 8 Ad & El 620 (rates and taxes); *Wroughton v Turtle* (1843) 11 M & W 561 at 570 (fines or renewal); *Frith v Rotherham* (1846) 15 LJ Ex 133 (bankers' commission); *Lawrence v Boston* (1851) 7 Exch 28 (premiums on policy of insurance).

5 Thus, upon an absolute grant of trees, an express power to cut and carry them away during five years does not restrict the implied power to cut and carry them away at any time: *Stukeley v Butler* (1614) Hob 168; and see Dyer 19b, pl 115 (1536); *Ellis v Noakes* [1932] 2 Ch 98n. Where, in a grant of land, there was an exception of minerals to the grantor, his heirs, and assigns, an express liberty for the grantor and his heirs to get them was held not to restrict the general right for the assigns to do so which was implied from the exception in their favour: *Earl of Cardigan v Armitage* (1823) 2 B & C 197; and see *Hodgson v Field* (1806) 7 East 613. 'Heirs' is not now ordinarily used as a word of limitation, descent to the heir being abolished (see the Administration of Estates Act 1925 s 45(1)(a); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 663).

6 See PARA 183 ante.

7 'The rule *expressio eorum* etc is to be understood having respect to itself only, and not having relation to other clauses. Thus, a grant of land carries the underwoods, and a grant of a house carries the shops in it; but the mention of underwoods or shops will save them from being excluded by a subsequent exception': *Stukeley v Butler* (1614) Hob 168 at 170.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(3) ADMISSION OF EXTRINSIC EVIDENCE/(i) To Vary or Add to Document/185. Extrinsic evidence generally excluded.

### **(3) ADMISSION OF EXTRINSIC EVIDENCE**

#### **(i) To Vary or Add to Document**

##### **185. Extrinsic evidence generally excluded.**

Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral<sup>1</sup> or contained in writings such as instructions<sup>2</sup>, drafts<sup>3</sup>, articles<sup>4</sup>, conditions of sale<sup>5</sup> or preliminary agreements<sup>6</sup> or memoranda provided for the 'protector' of a settlement<sup>7</sup>, either to show that intention<sup>8</sup> or to contradict, vary, or add to the terms of the document<sup>9</sup>. This principle applies to records<sup>10</sup>, arbitrators' awards<sup>11</sup>, bills of exchange and promissory notes<sup>12</sup>, bills of lading and charterparties<sup>13</sup>, bonds<sup>14</sup>, descriptions of boundaries<sup>15</sup>, guarantees<sup>16</sup>, leases<sup>17</sup>, contracts for the sale of goods<sup>18</sup>, and patents<sup>19</sup>. Verbal statements made by an auctioneer may not be part of the contract of sale<sup>20</sup>.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed<sup>21</sup>; or that the intention of the parties was other than that appearing on the face of the instrument<sup>22</sup>.

1 *Robinson v Gee* (1749) 1 Ves Sen 251 at 253; *Davis v Symonds* (1787) 1 Cox Eq Cas 402 at 404-405; *Humble v Hunter* (1848) 12 QB 310; *Halhead v Young* (1856) 6 E & B 312; *O'Rourke v Railways Comr* (1890) 15 App Cas 371, PC; *Neale v Neale* (1898) 79 LT 629, CA; *Vezey v Rashleigh* [1904] 1 Ch 634; *Horncastle v Equitable Life Assurance Society of the United States* (1906) 22 TLR 735, CA; *Goldfoot v Welch* [1914] 1 Ch 213; *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348, CA. See further CONTRACT vol 9(1) (Reissue) PARAS 622, 690-700.

2 See *Guardhouse v Blackburn* (1866) LR 1 P & D 109.

3 *Miller v Travers* (1832) 8 Bing 244; *National Bank of Australasia v Falkingham & Sons* [1902] AC 585, PC; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 at 140-141, [1958] 2 All ER 733 at 739-740 per Harman J. A signed draft may be looked at when the final copies differ: see *Ingleby v Slack* (1890) 6 TLR 284. In a case where the terms of a building agreement and a lease granted in connection with it differed, it was held both permissible and relevant to look at the draft lease under the agreement in order to discover the parties' intention in referring to a particular date in the lease as executed: *Ladbroke Group plc v Bristol City Council* [1988] 1 EGLR 126, CA.

4 *Pritchard v Quinchant* (1752) Amb 147.

5 *Gunnis v Erhart* (1789) 1 Hy Bl 289; *Powell v Edmunds* (1810) 12 East 6; *Doe d Norton v Webster* (1840) 12 Ad & El 442.

6 *Leggott v Barrett* (1880) 15 ChD 306 at 309, CA; and cf *Mercantile Bank of Sydney v Taylor* [1893] AC 317 at 321, PC; *Lee v Alexander* (1883) 8 App Cas 853 at 868, 871-872, HL; *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860 (where there is a conflict between a lease and a prior agreement, the rights of the parties are governed by the lease). See also *Kinlen v Ennis UDC* [1916] 2 IR 299 at 305, 308-309, HL.

7 See *IRC v Botnar* [1998] STC 38 at 87-88 per Evans-Lombe J.

8 'No extrinsic evidence of the intention of the party to the deed from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written': *Shore v Wilson* (1842) 9 Cl & Fin 355 at 556, HL, per Parke B, and at 565-567 per Tindal CJ; *Earl of Bradford v Earl of Romney* (1862) 30 Beav 431 at 436; *Reliance Marine Insurance Co v Duder* [1913] 1 KB 265 at 273, CA; *Goldfoot v Welch* [1914] 1 Ch 213 at 218; *Re Aynsley, Kyrle v Turner* [1915] 1 Ch 172, CA; *Tsang Chuen v Li Po*

*Kwa*[1932] AC 715 at 727, PC; *Re Atkinson's Will Trusts*[1978] 1 All ER 1275, [1978] 1 WLR 586 (evidence that testator used word in a special sense inadmissible); *Rabin v Gerson Berger Association Ltd*[1986] 1 All ER 374, [1986] 1 WLR 526, CA (evidence of counsel's opinion given before trust deed executed not admissible). As to the admission of extrinsic evidence to avoid a deed on the ground of forgery, mistake, fraud, illegality etc see PARA 67 et seq ante.

9 'I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the words of a deed': *Smith v Doe d Jersey* (1821) 2 Brod & Bing 473 at 541, HL, per Park B. If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract: *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64 per Lord Denman CJ. 'The court has no right to resort to correspondence and oral evidence for the purpose of striking out an important provision which the parties agreed upon and expressed in the agreement': *O'Connor v Hume*[1954] 2 All ER 301 at 306, CA, per Romer LJ. The principle enunciated in these dicta has been recognised from early times: see eg *Lord Cromwel's Case* (1601) 2 Co Rep 69b at 76a note (G 1); *Countess of Rutland's Case* (1604) 5 Co Rep 25b at 26a; *Meres v Ansell* (1771) 3 Wils 275; *Lord Irnham v Child* (1781) 1 Bro CC 92; *Haynes v Hare* (1791) 1 Hy Bl 659 at 664; *Woolham v Hearn* (1802) 7 Ves 211; *Henson v Coope* (1841) 3 Scott NR 48; *Ford v Yates* (1841) 2 Man & G 549; *Holmes v Mitchell* (1859) 7 CBNS 361; *Burges v Wickham* (1863) 3 B & S 669; *Inglis v John Buttery & Co*(1878) 3 App Cas 552, HL; *Edward Lloyd Ltd v Sturgeon Falls Pulp Co* (1901) 85 LT 162 (oral evidence not admissible to enlarge the scope of a written warranty); *Tsang Chuen v Li Po Kwa*[1932] AC 715, PC (where consideration is stated in the deed, evidence that there was no consideration is not admissible); *Meates v Westpac Banking Corp Ltd*(1990) Times, 5 July, PC. Where a document is construed as a contract and as containing a true and complete record of the terms agreed between the parties, extrinsic evidence will not be admitted to prove a different antecedent oral agreement: *Hutton v Watling*[1948] Ch 398 at 404, [1948] 1 All ER 803 at 805, CA, per Lord Greene MR; and see *WF Trustees Ltd v Expo Safety Systems Ltd*(1993) Times, 24 May. See also *Rabin v Gerson Berger Association Ltd*[1986] 1 All ER 374 at 377, [1986] 1 WLR 526 at 530, CA, per Fox LJ.

10 *Dickson v Fisher* (1768) 1 Wm Bl 664; *Prentice v Hamilton* (1831) Dra 410; *Keane v O'Brien*(1871) IR 5 CL 531. Extrinsic evidence may be admitted to explain the record: *Preston v Peeke* (1858) EB & E 336.

11 See ARBITRATION.

12 See *Free v Hawkins* (1817) 8 Taunt 92 (agreement not to demand payment until sale of certain estate and to dispense with notice of dishonour); *Abrey v Crux*(1869) LR 5 CP 37 (agreement to sell securities before suing on bill); *New London Credit Syndicate v Neale*[1898] 2 QB 487, CA (evidence of contemporaneous agreement to renew instrument); *Hitchins and Coulthurst Co v Northern Leather Co of America and Doushkess*[1914] 3 KB 907 (agreement in defeasance); and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1416, 1447.

13 See eg *Leduc & Co v Ward*(1888) 20 QBD 475, CA; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 221.

14 *Buckler v Millerd* (1688) 2 Vent 107; *Mease v Mease* (1774) 1 Cowp 47 (where it was sought to show that the bond was given by way of indemnity against another bond); *Tippins v Coates* (1853) 18 Beav 401.

15 See *Woolfs v Powling*[1999] All ER (D) 125, (1999) Times, 9 March, CA; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 929.

16 See eg *Holmes v Mitchell* (1859) 7 CBNS 361; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq.

17 *Preston v Merceau* (1779) 2 Wm Bl 1249 (evidence not admissible to prove an agreement to pay an additional rent to that mentioned in a lease); *Jones v Lavington*[1903] 1 KB 253, CA; *Crawford v White City Rink (Newcastle-on-Tyne) Ltd* (1913) 29 TLR 318 (collateral oral agreements between landlord and tenant relating to the subject matter of the written contract held inadmissible); *Henderson v Arthur*[1907] 1 KB 10, CA (oral agreement that lessor should take a three months' bill for each quarter's rent as it fell due, which, by the terms of the lease, was payable quarterly in advance, held inadmissible); but see *City and Westminster Properties (1934) Ltd v Mudd*[1959] Ch 129, [1958] 2 All ER 733 (collateral oral agreement, permitting the tenant to continue to reside in the demised premises despite covenant in new lease for business user only, upheld as a defence to the landlord's action seeking forfeiture for breach of covenant); and PARA 196 post.

18 *Smith v Jeffryes* (1846) 15 M & W 561 (evidence inadmissible to show that a written agreement for the sale of ware potatoes was intended to apply to a particular quality of potatoes of that description); cf *Frederick E Rose (London) Ltd v William H Pim, Junior & Co Ltd*[1953] 2 QB 450, [1953] 2 All ER 739, CA; *Harnor v Groves* (1855) 15 CB 667 (evidence inadmissible to prove a verbal representation amounting to a warranty); and see *Chanter v Hopkins* (1838) 4 M & W 399 at 406. If goods are sold by a written agreement which describes their quality, and makes no reference to any sample, evidence is not admissible at the instance of either buyer or

seller to prove that a sample was shown at the time of the sale in order to show that it was a sale by sample:  
*Tye v Fynmore* (1813) 3 Camp 462; *Meyer v Everth* (1814) 4 Camp 22.

19 *Glaverbel SA v British Coal Corp*n [1995] FSR 254, [1995] RPC 255, CA.

20 See *Powell v Edmunds* (1810) 12 East 6; and AUCTION vol 2(3) (Reissue) PARA 243.

21 *Prison Comrs v Middlesex Clerk of the Peace*(1882) 9 QBD 506, CA; *R v Pembridge Inhabitants* (1841) Car & M 157; *Palmer v Newell* (1855) 20 Beav 32 (affd (1856) 5 De GM & G 74).

22 See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 667; WILLS vol 50 (2005 Reissue) PARA 481 et seq. However, where a document on its face a deed, but witnessed as a will, was admitted to probate, it was said to be 'clear that extrinsic evidence is admissible for the purpose of shewing with what intention an ambiguous paper has been executed': *Re Slinn's Goods* (1890) 15 PD 156 at 158; and see *Cocks v Nash* (1832) 9 Bing 341 at 346; *Halhead v Young* (1856) 6 E & B 312; *Cowlshaw v Hardy* (1857) 25 Beav 169 at 175; *Turner v Turner, Hall v Turner*(1880) 14 ChD 829; *Mercantile Bank of Sydney v Taylor*[1893] AC 317, PC; *Henderson v Arthur*[1907] 1 KB 10, CA. This rule does not, of course, prejudice any rights the parties may have to rectification or rescission: see PARA 189 post; and MISTAKE vol 77 (2010) PARA 52 et seq. As to evidence of intention to explain a latent ambiguity see PARA 209 post. As to the admissibility of evidence of authority to sign a memorandum of a contract see SALE OF LAND vol 42 (Reissue) PARA 40.

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### 186. Principal and agent.

Extrinsic evidence generally cannot be received in order to prove that a person appearing, on the face of the document, to be a principal was in fact an agent, if that evidence is inconsistent either with the express terms of the written agreement<sup>1</sup> or with an oral declaration made contemporaneously<sup>2</sup>. Where, however, it is not inconsistent with the written contract to show that the contracting party was only an agent, as where he gives himself no special description and there is nothing in the instrument to define his character<sup>3</sup>, extrinsic evidence is admissible to show who the principal is, for the purpose either of charging him on the contract or of enabling him to enforce it<sup>4</sup>. Where a person contracts professedly as an agent, then, in order to charge him on the contract, it may be shown by extrinsic evidence that he is in fact the principal<sup>5</sup>. If, on the construction of a written contract made by an agent he undertakes personal liability, extrinsic evidence of intention is not admissible to exonerate him from liability<sup>6</sup>, except that by way of equitable defence he may set up an express agreement between himself and the other contracting party to that effect<sup>7</sup>.

1 *Humble v Hunter* (1848) 12 QB 310 (where an agent was described in a charterparty as the owner of the vessel, and it was held that extrinsic evidence was inadmissible to show that he was not the owner, so as to entitle the real owner to sue on the contract); *Formby Bros v Formby* (1910) 102 LT 116, CA (where one of the parties was referred to throughout as 'proprietor,' and it was held that evidence was not admissible to prove that party was acting as agent for an undisclosed principal, for the purpose of charging the principal); but see *Epps v Rothnie* [1945] KB 562 at 565, [1946] 1 All ER 146 at 147, CA, per Scott LJ (where the opinion was expressed that neither of these cases can any longer be regarded as good law); and cf *Pontifex and Wood Ltd v Hartley & Co* (1893) 62 LJQB 196, CA (no concluded contract in writing; extrinsic evidence admissible).

2 *Lucas v De la Cour* (1813) 1 M & S 249.

3 *Humble v Hunter* (1848) as reported in 17 LJQB 350 at 352. It is inconsistent with an instrument to show that a party who contracts as owner or proprietor is merely an agent: see *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203 at 207, HL, per Viscount Haldane LC. The word 'tenant' or 'lessee' is not inconsistent with agency; but it is otherwise in the case of the description 'lessor', for this implies an antecedent interest in the property: *Danziger v Thompson* [1944] KB 654, [1944] 2 All ER 151.

4 *Bateman v Phillips* (1812) 15 East 272; *Wilson v Hart* (1817) 1 Moore CP 45; *Trueman v Loder* (1840) 11 Ad & El 589; *Morris v Wilson* (1859) 5 Jur NS 168; *Spurr v Cass* (1870) LR 5 QB 656; *Calder v Dobell* (1871) LR 6 CP 486, Ex Ch; *Weidner v Hoggett* (1876) 1 CPD 533; *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, HL; *Danziger v Thompson* [1944] KB 654, [1944] 2 All ER 151. The consideration must move from the principal in order to enable him to enforce the contract: *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* [1915] AC 847, HL. See AGENCY vol 1 (2008) PARA 125.

5 *Railton v Hodgson* (1804) 4 Taunt 576n; *Jenkins v Hutchinson* (1849) 13 QB 744; *Carr v Jackson* (1852) 7 Exch 382; *Adams v Hall* (1877) 37 LT 70; *Young v Schuler* (1883) 11 QBD 651, CA; *Hutcheson v Eaton* (1884) 13 QBD 861, CA; and see AGENCY vol 1 (2008) PARA 156 et seq. As to the right of the ostensible agent to sue on the contract in such a case see *Bickerton v Burrell* (1816) 5 M & S 383; *Rayner v Grote* (1846) 15 M & W 359; *Schmalz v Avery* (1851) 16 QB 655; *Sharman v Brandt* (1871) LR 6 QB 720, Ex Ch; contrast *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA (where the purported principal was a non-existent company and the contract was a nullity); and see further COMPANIES vol 14 (2009) PARA 66.

6 See AGENCY vol 1 (2008) PARA 156 et seq.

7 See *Cowie v Witt* (1874) 23 WR 76; and AGENCY vol 1 (2008) PARA 156 et seq.

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### 187. Evidence of previous negotiations.

The construction of a document cannot be controlled by previous negotiations<sup>1</sup>; and when a written agreement is carried into effect by a conveyance, the conveyance becomes the final evidence of the intention of the parties, and is not liable to be varied by reference to the agreement<sup>2</sup>; nor is the construction of a written instrument varied by the subsequent declaration<sup>3</sup> or conduct<sup>4</sup> of the parties. The instrument is to be construed as at the time of its execution<sup>5</sup>.

1 'The law is that whatever the negotiations may be that precede the purchase, still the parties to the conveyance are bound by it': *Prison Comrs v Middlesex Clerk of the Peace* (1882) 9 QBD 506 at 511, CA, per Jessel MR. Drafts cannot be looked at: *National Bank of Australasia v Falkingham & Sons* [1902] AC 585 at 591, PC; and see *Attwood v Small* (1838) 6 Cl & Fin 232, HL; *London Corpn v Sandon*, *London Corpn v Metropolitan Rly Co*, *Metropolitan Rly Co v London Corpn* (1872) 26 LT 86; *British Equitable Assurance Co Ltd v Baily* [1906] AC 35, HL; *Millbourn v Lyons* [1914] 2 Ch 231, CA; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733. As to the rule see generally *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL (evidence of prior negotiations not admissible in construction of agreement for sale of shares); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL. See, however, *Willson v Greene* [1971] 1 All ER 1098, [1971] 1 WLR 635 (evidence of boundary as pegged out and accepted before contract admitted where parcels in conveyance vague and plan expressed to be for purposes of identification only).

2 Where an executory contract has been carried out by deed, the contract is merged in the deed, so far as the deed covers the subject matter of the contract, and it cannot be used to vary the deed: see *Leggott v Barrett* (1880) 15 ChD 306 at 311, CA, per Brett LJ, and at 309 per James LJ ('you have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself'); *Williams v Morgan* (1850) 15 QB 782; *Teebay v Manchester, Sheffield and Lincolnshire Rly Co* (1883) 24 ChD 572; *Palmer v Johnson* (1884) 13 QBD 351 at 359, CA; *Millbourn v Lyons* [1914] 2 Ch 231, CA; *International Press Centre v Norwich Union Insurance Co* (1986) 36 BLR 130, [1986] 2 FTLR 229; cf *Greswolde-Williams v Barneby* (1900) 49 WR 203; and see *Salaman v Glover* (1875) LR 20 Eq 444 (where, upon a lease being granted pursuant to an agreement, and in accordance with a scheduled form, a proviso in the agreement excluding certain rights of light and air was read as if inserted in the lease). Similarly, conditions of sale cannot control the construction of the conveyance: *Doe d Norton v Webster* (1840) 12 Ad & El 442. But where a condition in an agreement for sale is capable of taking effect after completion and relates to a matter not dealt with by the conveyance, it will continue to have full force and effect after completion: *Eagon v Dent* [1965] 3 All ER 334 (where it was conceded that a condition of sale had not merged in the assignment); *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757; and see *White v Taylor (No 2)* [1969] 1 Ch 160 at 180, [1968] 1 All ER 1015 at 1025 per Buckley J; *Hashman, Riback and Bel-Aire Estates Ltd v Anjulin Farms Ltd* [1973] 2 WWR 361, Can SC. A patent ambiguity in a lease may be explained by reference to the counterpart: *Matthews v Smallwood* [1910] 1 Ch 777. The purchaser, however, immediately after the agreement and before the conveyance, is entitled to have everything which the agreement, strictly interpreted, gives him: *Humphries v Horne* (1844) 3 Hare 276 at 277 per Wigram V-C.

3 It is always legitimate to look at all the co-existing circumstances, in order to apply the language and so to construe the contract; but subsequent declarations, showing what the party supposed to be the effect of the contract, are not admissible to construe it: *Lewis v Nicholson* (1852) 18 QB 503 at 510 per Lord Campbell CJ; and see *Doe d Norton v Webster* (1840) 12 Ad & El 442; *Bruner v Moore* [1904] 1 Ch 305 at 310 per Farwell J; *Houlder Bros & Co Ltd v Public Works Comr*, *Public Works Comr v Houlder Bros & Co Ltd* [1908] AC 276, PC.

4 'No point of law can, I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are, as such, admissible for the purpose of determining its meaning': *Monro v Taylor* (1848) 8 Hare 51 at 56 per Wigram V-C (affd (1852) 3 Mac & G 713); and see *Bruner v Moore* [1904] 1 Ch 305; *Belton v Bass, Ratcliffe and Grettton Ltd* [1922] 2 Ch 449. This is so, if the words are plain and unambiguous: *North Eastern Rly Co v Lord Hastings* [1900] AC 260 at 263, HL, per Lord Halsbury LC. Compare the different rule where the terms of an ancient instrument (or, perhaps, any instrument of title to land) are doubtful: see PARA 206 post.

5     *Balfour v Welland* (1809) 16 Ves 151 at 156; *Lord Hastings v North Eastern Rly Co* [1899] 1 Ch 656 at 664, CA (affd sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL).

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### **188. Contracts.**

As regards contracts the rule as to the exclusion of extrinsic evidence is not confined to contracts which are required by law to be evidenced by writing in order to be enforceable<sup>1</sup>, but applies generally in all cases where the agreement between the parties is in fact reduced to writing<sup>2</sup>.

Extrinsic evidence is not only excluded as a general rule in reference to matters which are expressly dealt with by the written agreement, but also in reference to terms implied by law with regard to which the document is silent<sup>3</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 623 et seq.

2 However, as to proceedings for discretionary remedies such as rectification, rescission or specific performance see PARA 189 post. Previously (ie before courts were courts of both law and equity, when the distinction between law and equity was important) the rule was of equal force in equity as at law: see *Price v Dyer* (1810) 17 Ves 356; *Clowes v Higginson* (1813) 1 Ves & B 524; *Ball v Storie* (1823) 1 Sim & St 210; *Croome v Lediard* (1834) 2 My & K 251; *Martin v Pycroft* (1852) 2 De GM & G 785 at 795.

3 *Rich v Jackson* (1794) 4 Bro CC 514 (lease silent as to payment of taxes; evidence not admissible to prove a verbal agreement that it was to be free of all taxes); *Croome v Lediard* (1834) 2 My & K 251 (agreement by A to buy an estate from B, and B to buy another estate from A; evidence not admissible to show that a mutual exchange was intended, and that the contracts were to be dependent on each other; specific performance of one of the contracts decreed, though the defendant was unable to show a good title to the property sold by him); *Ford v Yates* (1841) 2 Man & G 549 (written contract for sale of hops, nothing being said as to credit; evidence not admissible to show that by the course of dealing between the parties the buyer was entitled to six months' credit); *Burges v Wickham* (1863) 3 B & S 669 at 696-697 per Blackburn J; *Evans v Roe* (1872) LR 7 CP 138 (written agreement for service at a weekly salary, implying a weekly hiring; evidence of conversations showing an intention that the hiring should be a yearly one not admissible). There is a dictum in *McGrory v Alderdale Estate Co* [1918] AC 503 at 508, HL, to the effect that the implied obligation, in an open contract for the sale of land, to make a good title may be rebutted by evidence that the purchaser knew of a particular defect, but the judgments in this case are directed to the consideration of whether there was a waiver and do not, it is submitted, impugn the statement in the text. As to cases where the document does not contain the whole contract see PARA 190 note 6 post.



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### **189. Proceedings in which rule not enforced.**

The rule as to the exclusion of extrinsic evidence is not enforced when the court is asked to grant a discretionary remedy such as rectification or rescission on the ground of mistake<sup>1</sup> or specific performance. In proceedings for specific performance the defendant is allowed to give extrinsic evidence to show that the written instrument does not represent the real contract between the parties<sup>2</sup> or, if the claimant shows by extrinsic evidence that owing to mutual mistake the written instrument does not represent the real contract, he may be granted specific performance of the instrument as rectified<sup>3</sup>.

Moreover the rule is strictly applied only when the language of the instrument is clear<sup>4</sup>; if the construction is doubtful, and the doubt cannot be removed in any other way, it is permissible to refer to a preliminary agreement, at any rate if recited in the instrument<sup>5</sup>, or to surrounding circumstances at the time that the instrument was made for the purpose of adding words to it<sup>6</sup>, or to acts done in pursuance of the instrument<sup>7</sup>, though not to mere subsequent declarations.

1 See eg *Baker v Paine* (1750) 1 Ves Sen 456; and MISTAKE vol 77 (2010) PARA 52 et seq.

2 See eg *Ramsbottom v Gosden* (1812) 1 Ves & B 165 (where the plaintiff was put to his election to have the contract performed according to the oral agreement or to have his proceedings dismissed); and see further MISTAKE vol 77 (2010) PARA 45; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 876.

3 *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 876. Extrinsic evidence can only be admitted where the written agreement is not drawn according to the intention of the parties: *Omerod v Hardman* (1801) 5 Ves 722 at 730.

4 See *Clifton v Walmesley* (1794) 5 Term Rep 564.

5 *Leggott v Barrett* (1880) 15 ChD 306 at 311, CA, per Brett LJ ('if there is any doubt about the construction of the governing words, the recital may be looked at to determine what is the true construction'). See also PARA 218 post.

6 *Shipley UDC v Bradford Corp*n [1936] Ch 375 at 389-391, CA, per Clauson J ('per annum' added to '£540' and 'per diem' to '450,000 gallons'). See also *Willson v Greene* [1971] 1 All ER 1098, [1971] 1 WLR 635 (evidence of surrounding circumstances existing before the contract admitted where parcels in conveyance vague and plan expressed to be for purposes of identification only); and PARA 198 post.

7 See PARA 206 post.

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### 190. Intention not to make binding contract.

It may be proved by extrinsic evidence that a document which purports to be a contract is informal and was not intended to be a binding agreement, although it is signed by the person who refuses to be bound by it<sup>1</sup> or that it was not intended to contain all the terms<sup>2</sup>, or that it was signed by mistake<sup>3</sup>. In the case of bought and sold notes, it may be shown by either party that the sale was merely colourable and the price nominal, and that it was not their intention in signing the notes to make a binding contract<sup>4</sup>; and in the case of a document purporting to be a written agreement for the sale of property, evidence has been admitted to show that it was only a pretended sale to avoid execution against the property<sup>5</sup>.

It is in all cases a question of fact whether a particular document was intended to express the whole of the terms of the contract between the parties<sup>6</sup>, and with what intention it was signed by one or other of the parties<sup>7</sup>, and on these points extrinsic evidence is admissible.

1 *Pattle v Hornibrook* [1897] 1 Ch 25 (document signed by both plaintiff and defendant; it was held that the defendant might prove that he did not intend to be bound until satisfied as to the plaintiff's responsibility). See also *Harris v Rickett* (1859) 4 H & N 1 (oral agreement admissible where writing did not contain, and was not intended to contain, entire obligation); *Clever v Kirkman* (1875) 33 LT 672; *Lewis v Brass* (1877) 3 QBD 667, CA; *Hussey v Horne-Payne* (1879) 4 App Cas 311 at 323, HL, per Lord Selborne; *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59.

2 See *McCullin v Giplin* (1881) 6 QBD 516 at 518, CA; *Pontifex and Wood Ltd v Hartley & Co* (1893) 62 LJQB 196 at 200, CA; *Lindley v Lacey* (1864) 17 CBNS 578. Other examples are *Jeffery v Walton* (1816) 1 Stark 267; *Allan v Sundius* (1862) 1 H & C 123 at 131; *Lockett v Nicklin* (1848) 2 Exch 93.

3 *Pym v Campbell* (1856) 6 E & B 370 at 374 per Crompton J; and see *Gudgen v Besset* (1856) 6 E & B 986; *Furness v Meek* (1857) 27 LJ Ex 34; *Pattle v Hornibrook* [1897] 1 Ch 25 at 30. Such evidence is admissible not to contradict the face of the agreement but to prove a mistake therein which cannot be proved otherwise: *Baker v Paine* (1750) 1 Ves Sen 456 at 457 per Lord Hardwicke LC; and see *Olley v Fisher* (1886) 34 ChD 367 at 369.

4 *Rogers v Hadley* (1863) 2 H & C 227.

5 *Bowes v Foster* (1858) 2 H & N 779.

6 *Jones v Littledale* (1837) 1 Nev & PKB 677 (invoice by brokers as sellers of goods by auction); *Allen v Pink* (1838) 4 M & W 140 (receipt given on the sale of a horse held not to exclude evidence of a verbal warranty, there being no evidence that the buyer had agreed that the receipt should contain a statement of the whole of the terms of the contract); *Lockett v Nicklin* (1848) 2 Exch 93; *Moore v Campbell* (1854) 10 Exch 323 (broker, employed by buyer, sent contract note to seller; seller sent note to broker varying the terms; it was held, in an action by the buyer, to be a question of fact whether the note sent by the seller was intended by both parties to be the contract between them); *Holding v Elliott* (1860) 5 H & N 117 (invoice); *Long v Millar* (1879) 4 CPD 450, CA (receipt for part payment and memorandum of agreement); *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA (oral warranty at auction sale of heifer held to override printed auction conditions).

7 *Latch v Wedlake* (1840) 11 Ad & El 959 (agreement expressed to be made between the plaintiff and three partners, executed by the plaintiff and two of the partners; it was held to be a question for the jury whether the two partners intended to sign on behalf of all three, the circumstances indicating that the partners did not intend to be bound unless all three signed); *Young v Schuler* (1883) 11 QBD 651, CA (evidence of contemporaneous statements to show that a person contracting as an agent intended to sign, not only as an agent, but also as a surety for the principal).

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### **191. Condition precedent to binding contract.**

Extrinsic evidence is admissible to show that a written agreement which purports to be unconditional was in fact executed with the intention that it should only take effect as a contract on the performance of a condition precedent<sup>1</sup>. For example, in the case of a written agreement for the assignment of a lease, it may be proved that there was a contemporaneous oral agreement that the contract should be null and void if the lessor did not consent to the assignment<sup>2</sup>; a person signing a contract as a surety may prove that he only intended to be bound in the event of a proposed co-surety joining<sup>3</sup>; it may be shown that an instrument was not intended by a party to it to operate as an agreement unless it was signed by the other party<sup>4</sup> or by a third person<sup>5</sup>; a contemporaneous oral agreement that a written contract should not be a bargain unless a third person approved of it may be proved<sup>6</sup>; and a person who has signed an agreement may prove that he did not intend to bind himself until he had satisfied himself of the responsibility of the other contracting party, and that the other party knew that<sup>7</sup>. So, it may be proved that a written agreement was not intended to operate from the time of its execution but from some future and uncertain time<sup>8</sup>.

This principle applies to bills of exchange and other negotiable instruments delivered subject to a condition, as between the immediate parties<sup>9</sup>.

1 *Murray v Earl of Stair* (1823) 2 B & C 82; *Latch v Wedlake* (1840) 11 Ad & El 959 (evidence of remarks of plaintiff during negotiations); *Moore v Campbell* (1854) 10 Exch 323 (broker sending a sold note may show that it was only intended to operate as a contract if the person to whom it was sent signed and returned a corresponding note); *Lindley v Lacey* (1864) 17 CBNS 578; *Guardhouse v Blackburn* (1866) LR 1 P & D 109; *Clever v Kirkman* (1875) 33 LT 672; and see notes 2-8 infra. As to the delivery of a deed as an escrow see *Furness v Meek* (1857) 27 LJ Ex 34; and PARAS 37-39 ante.

2 *Wallis v Littell* (1861) 11 CBNS 369.

3 *Evans v Bremridge* (1856) 8 De GM & G 100.

4 *Furness v Meek* (1857) 27 LJ Ex 34; *McClellan v Kennard* (1874) 9 Ch App 336.

5 *Boyd v Hind* (1857) 1 H & N 938, Ex Ch.

6 *Pym v Campbell* (1856) 6 E & B 370.

7 *Pattle v Hornibrook* [1897] 1 Ch 25.

8 *Davis v Jones* (1856) 17 CB 625.

9 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1445.

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## 192. Further examples of admissibility of extrinsic evidence.

Extrinsic evidence is also admissible to show that the transaction is affected by fraud<sup>1</sup>, immorality or illegality<sup>2</sup>, duress<sup>3</sup>, mistake<sup>4</sup> or misrepresentation<sup>5</sup>; to show the true consideration<sup>6</sup>, or the existence of consideration<sup>7</sup>, or of consideration in addition to that stated<sup>8</sup>; and to show the nature of the transaction<sup>9</sup>, or the true relationship of the parties<sup>10</sup>.

1 *Clowes v Higginson* (1813) 1 Ves & B 524 at 527 per Plumer V-C; *Foster v Mackinnon* (1869) LR 4 CP 704; *Lewis v Clay* (1897) 67 LQB 224; *Guildford Trust Ltd v Pohl and Maritch* (1928) 72 Sol Jo 171 at 172; and see generally MISREPRESENTATION AND FRAUD.

2 *Collins v Blantern* (1767) 2 Wils 341; *Woods v Wise* [1955] 2 QB 29, [1955] 1 All ER 767, CA (whether sum payable under an underlease constituted an illegal premium); and see CONTRACT vol 9(1) (Reissue) PARA 838.

3 See CONTRACT vol 9(1) (Reissue) PARAS 709-711; EQUITY vol 16(2) (Reissue) PARA 436.

4 *Clowes v Higginson* (1813) 1 Ves & B 524; *Raffles v Wichelhaus* (1864) 2 H & C 906 at 908; and see generally MISTAKE.

5 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, CA; and see generally MISREPRESENTATION AND FRAUD.

6 *R v Scammonden Inhabitants* (1789) 3 Term Rep 474; *Townend v Toker* (1866) 1 Ch App 446 at 459-460; and cf *Cochrane v Moore* (1890) 25 QBD 57, CA.

7 *Re Holland, Gregg v Holland* [1902] 2 Ch 360 at 388, CA.

8 *Clifford v Turrell* (1845) 14 LJ Ch 390; *Re Barnstaple Second Annuitant Society* (1884) 50 LT 424; *Frith v Frith* [1906] AC 254, PC; *Turner v Forwood* [1951] 1 All ER 746, CA; and see PARA 194 post.

9 *Barton v Bank of New South Wales* (1890) 15 App Cas 379, PC (conveyance on its face absolute may be shown to be a mortgage); *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA (conveyance on its face absolute may be shown to be subject to a trust); *Beattie v Jenkinson* [1971] 3 All ER 495, [1971] 1 WLR 1419 (onus not discharged of proving that conveyance on its face absolute was in fact by way of security); and see *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA; *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, [1967] 1 All ER 518, CA; *United Dominions Trust Ltd v Beech, Savan, Tabner and Thompson* [1972] 1 Lloyd's Rep 546; *United Dominions Trust Ltd v Western* [1976] QB 513 at 522-523, [1975] 3 All ER 1017 at 1023, CA, per Megaw LJ (note that *Campbell Discount Co Ltd v Gall* [1961] 1 QB 431, [1961] 2 All ER 104, CA, is no longer good law); and CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq. Cf *Re Boyes, Boyes v Carritt* (1884) 26 ChD 531; *Re Duke of Marlborough, Davis v Whitehead* [1894] 2 Ch 133; and see PARA 198 et seq post; and TRUSTS vol 48 (2007 Reissue) PARAS 644, 673; WILLS vol 50 (2005 Reissue) PARA 481 et seq. As to the right of one of several purchasers to show that they are mutually entitled to the benefit of covenants entered into by each of the purchasers of several plots on one estate, although not expressly mentioned in the conveyance, and the distinction between this right and a collateral agreement see *Spicer v Martin* (1888) 14 App Cas 12, HL; para 196 post; and EQUITY vol 16(2) (Reissue) PARAS 724-725, 750.

10 See PARA 185 ante. See also *Newell v Radford* (1867) LR 3 CP 52 (to show the trades of the parties to a memorandum of sale as indicating which was seller and which was buyer); *Macdonald v Whitfield* (1883) 8 App Cas 733 at 745, PC (to prove that three successive indorsees of a bill of exchange were sureties inter se for the same debt); *Re Lander and Bagley's Contract* [1892] 3 Ch 41 (to show date of commencement of a lease); *Bank of Australasia v Palmer* [1897] AC 540, PC (to show that a document signed by one of the parties to an agreement did not form part of the agreement).

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### **193. Extrinsic evidence to prove date.**

Extrinsic evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument. A deed takes effect from delivery, and any other written instrument from the date of execution, and though the date expressed in the instrument is prima facie to be taken as the date of delivery or execution<sup>1</sup>, this does not exclude extrinsic evidence of the actual date; and the actual date, when proved, prevails, in case of variance, over the apparent date<sup>2</sup>. A reference in the deed to its date (for example, a covenant to do a thing within a specified time after the date of the deed) is, however, construed as referring to the date expressed in the deed, unless there is no date so expressed, or an impossible date, and then the reference is taken to be to the date of delivery<sup>3</sup>.

1 *Malpas v Clements* (1850) 19 LJQB 435; *Morgan v Whitmore* (1851) 6 Exch 716 at 719; and see *Re Shaw, Public Trustee v Little* (1914) 110 LT 924, CA (appointment of Public Trustee); and PARA 60 ante.

2 *Goddard's Case* (1584) 2 Co Rep 4b; *Clayton's Case* (1585) 5 Co Rep 1a; Shep Touch 72; *Hall v Cazenove* (1804) 4 East 477; *Steele v Mart* (1825) 4 B & C 272. The rule uniformly acted upon from the time of *Clayton's Case* supra to the present date is that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of the deed; that date, indeed, is to be taken prima facie as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded: *Browne v Burton* (1847) 5 Dow & L 289 at 292 per Patteson J; and cf *Jayne v Hughes* (1854) 10 Exch 430 at 433; *Reffell v Reffell* (1866) LR 1 P & D 139 at 142.

3 Co Litt 46b; *Styles v Wardle* (1825) 4 B & C 908.

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#### **194. Extrinsic evidence to prove consideration.**

Where no consideration<sup>1</sup>, or a nominal consideration<sup>2</sup>, is expressed in the instrument, or the consideration is expressed in general terms<sup>3</sup> or is ambiguously stated<sup>4</sup>, extrinsic evidence is admissible to prove the real consideration<sup>5</sup>; and where a substantial consideration is expressed in the instrument, extrinsic evidence is admissible to prove an additional consideration, provided that this is not inconsistent with the terms of the instrument<sup>6</sup>. It is not in contradiction to the instrument to prove a larger consideration than that which is stated<sup>7</sup>. Extrinsic evidence is admissible to prove the illegality of the consideration<sup>8</sup>.

Extrinsic evidence may also be admitted to prove payment of consideration<sup>9</sup> and to prove by whom it was paid<sup>10</sup>.

1 Shep Touch 510; *Pott v Todhunter* (1845) 2 Coll 76 at 84; *Townend v Toker* (1866) 1 Ch App 446 at 459; *Llanelly Rly and Dock Co v London and North Western Rly Co* (1873) 8 Ch App 942 at 955 (affd (1875) LR 7 HL 550); *Re Holland, Gregg v Holland* [1902] 2 Ch 360 at 388, CA.

2 *Re British and Foreign Cork Co, Leifchild's Case* (1865) LR 1 Eq 231; *Turner v Forwood* [1951] 1 All ER 746, CA.

3 Shep Touch 510; *Mildmay's Case* (1584) 1 Co Rep 175a at 176a, b; *Tull v Parlett* (1829) Mood & M 472 ('divers good considerations'); *Gale v Williamson* (1841) 8 M & W 405 ('natural love and affection').

4 *Booker v Seddon* (1858) 1 F & F 196.

5 As to non-admissibility for the purpose of explaining the promise of guarantee see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq. See also *Pao On v Lau Yiu Long* [1980] AC 614 at 631, [1979] 3 All ER 65 at 75, PC.

6 *Villers v Beaumont* (1556) 2 Dyer 146a; *Vernon's Case* (1572) 4 Co Rep 1a at 3a; *Bedell's Case* (1607) 7 Co Rep 40a; *R v Scammonden Inhabitants* (1789) 3 Term Rep 474; *Nixon v Hamilton* (1838) 2 Dr & Wal 364 at 385; *Clifford v Turrell* (1841) 1 Y & C Ch Cas 138 at 149 (on appeal (1845) 9 Jur 633 at 633-634 per Lord Lyndhurst LC ('the settled rule of law is, that you may go out of the deed to prove a consideration that stands well with that stated on the face of the deed, but you cannot be allowed to prove a consideration inconsistent with it')); *Frail v Ellis* (1852) 16 Beav 350; *Frith v Frith* [1906] AC 254, PC. In *Peacock v Monk* (1748) 1 Ves Sen 127 at 128, Lord Hardwicke LC expressed the view that, unless the deed said 'and for other considerations', a consideration in addition to that expressed would be contrary to the deed, and evidence of it could not be admitted; but this must be taken to be overruled: see *Clifford v Turrell* supra; *Bayspoole v Collins* (1871) 6 Ch App 228; *Stiles v A-G* (1740) 2 Atk 152.

7 *Clifford v Turrell* (1845) 14 LJ Ch 390; *Frith v Frith* [1906] AC 254, PC; *Turner v Forwood* [1951] 1 All ER 746 at 748, CA, per Lord Goddard CJ.

8 See PARA 68 ante.

9 *Smith v Battams* (1857) 26 LJ Ex 232.

10 *R v Llangunnor Inhabitants* (1831) 2 B & Ad 616.

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**195. Evidence of usage.**

Evidence of usage is admissible for the purpose of adding to a written contract provisions (which are not inconsistent therewith) in respect of matters upon which it is silent<sup>1</sup>.

<sup>1</sup> As to a treatment of the subject in detail see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 677 et seq. See also PARAS 181 ante, 203 post.

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## 196. Evidence of collateral oral agreements.

Under certain conditions evidence may be given of an oral agreement contemporaneous with and touching the subject matter of a written agreement and as to which the written agreement is wholly silent<sup>1</sup>. The necessary conditions are that the oral agreement must be entirely collateral to the written agreement<sup>2</sup>, that it must not contradict the written agreement<sup>3</sup>, and that it must be proved strictly<sup>4</sup>. The oral agreement will be more readily enforced if it was an inducement to entering into the written agreement<sup>5</sup>. The oral agreement, moreover, must not be such as is required by the Statute of Frauds<sup>6</sup> or otherwise to be in writing<sup>7</sup>.

<sup>1</sup> *Mercantile Agency Co v Flitwick Chalybeate Co* (1897) 14 TLR 90, HL; *Edward Lloyd Ltd v Sturgeon Falls Pulp Co Ltd* (1901) 85 LT 162 (verbal warranty respecting matter on which a written contract was silent); and see notes 2-4 infra.

<sup>2</sup> The following agreements have been held to be collateral: (1) an oral agreement by a landlord to destroy rabbits, made on the granting of a lease of grassland (*Morgan v Griffith* (1871) LR 6 Exch 70; *Erskine v Adeane* (1873) 8 Ch App 756); and (2) a verbal representation, amounting to warranty, made upon letting a house, that the drains are in good order (*De Lassalle v Guildford* [1901] 2 KB 215, CA). If the vendor assumes to assert a fact of which the buyer is ignorant, this is evidence of an intention to warrant the fact, but it is not conclusive: *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 50, HL, overruling on this point *De Lassalle v Guildford* supra. See also *Collins v Hopkins* [1923] 2 KB 617. An oral agreement to put the premises into repair has been held to be collateral (*Mann v Nunn* (1874) 43 LJCP 241); although this case has been doubted (*Angell v Duke* (1875) 32 LT 320). On an agreement to let a house and scheduled furniture a previous oral agreement to provide more furniture is not admissible (*Angell v Duke* supra; *Burtsal v Bianchi* (1891) 65 LT 678); but in *Angell v Duke* (1875) LR 10 QB 174 (an earlier stage), such an agreement was held to be collateral. See also *Lindley v Lacey* (1864) 17 CBNS 578; *Spicer v Martin* (1888) 14 App Cas 12, HL; *Crawford v White City Rink (Newcastle-on-Tyne) Ltd* (1913) 29 TLR 318; *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Jameson v Kinnell Bay Land Co Ltd* (1931) 47 TLR 593, CA (oral promise by the vendor of a building plot that a road giving access to the plot would be constructed); *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733 (collateral oral agreement enforced permitting the tenant to continue to reside in the demised premises despite covenant in new lease for business user only). See also *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA (oral assurance that goods in containers would be shipped under deck).

<sup>3</sup> *Morgan v Griffith* (1871) LR 6 Exch 70 at 73; *Erskine v Adeane* (1873) 8 Ch App 756 at 766; *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, CA; *Edward Lloyd Ltd v Sturgeon Falls Pulp Co Ltd* (1901) 85 LT 162; *Henderson v Arthur* [1907] 1 KB 10, CA; *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushness* [1914] 3 KB 907. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1447.

<sup>4</sup> *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47, HL, per Lord Moulton; *Jacobs v Batavia and General Plantations Trust* [1924] 2 Ch 329 at 335-336, CA; *Hodges v Jones* [1935] Ch 657 at 667-668. Formal written documents should only be qualified by reference to oral transactions where the evidence is clear and compelling, particularly when it is sought to affect persons who were not themselves party to the transactions: *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775.

<sup>5</sup> *Morgan v Griffith* (1871) LR 6 Exch 70; *Erskine v Adeane* (1873) 8 Ch App 756; and cf *Seago v Deane* (1828) 4 Bing 459.

<sup>6</sup> See the Statute of Frauds (1677) s 4 (as amended) (replaced and repealed for certain purposes: see PARA 141 note 1 ante); and PARA 145 ante.

<sup>7</sup> If the contract is really collateral, it is not required to be in writing merely because the principal agreement, which is in writing, relates to an interest in land: *Angell v Duke* (1875) LR 10 QB 174 at 178; *Boston v Boston* [1904] 1 KB 124, CA; and cf *Mechelen v Wallace* (1837) 7 Ad & El 49. See also CONTRACT vol 9(1) (Reissue) PARA 627.





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**197. Evidence of explanatory note accompanying form.**

Where a form, such as a claim form, obviously intended to be read by lawyers, is accompanied by an explanatory note obviously intended to be read by laymen, it seems that, although it is the terms of the claim form which governs the legal relationship, account may be taken of the note in construing the form<sup>1</sup>.

<sup>1</sup> See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

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## **(ii) To Explain the Meaning and Application of Words**

### **198. Surrounding circumstances.**

The object of interpretation is, as already stated, to ascertain the intention of the parties to the instrument as expressed by the words they have used, that is what the user of the words would objectively have been understood to mean<sup>1</sup>; and, since the words are the sole guide to the intention<sup>2</sup>, extrinsic evidence of that intention is not admissible, save in the case of a latent ambiguity which cannot otherwise be resolved<sup>3</sup>.

Extrinsic evidence is, however, admissible both to ascertain where necessary the meaning of the words used<sup>4</sup>, and to identify the persons or objects to which they are to be applied<sup>5</sup>, for example to connect the language of a deed with the property conveyed<sup>6</sup>, and, since the meaning and the application will depend upon the circumstances surrounding the author at the time when the words were used<sup>7</sup>, the same principle requires that evidence of such circumstances should be admitted<sup>8</sup>. The court, which has to construe the document, ought to know the surrounding circumstances at the time when it was executed<sup>9</sup>, so as to place itself, as nearly as possible, in the position of the parties<sup>10</sup>. In a commercial contract the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties are operating<sup>11</sup>. The intention of the parties is expressed in the words, used as they were with regard to the particular circumstances and facts<sup>12</sup>. Moreover, it may appear from the surrounding circumstances that a series of instruments, although not expressly referring to each other, are part of the same transaction, so that they must be construed together<sup>13</sup>; and evidence is admissible for this purpose<sup>14</sup>. However, the surrounding circumstances which are admissible under these principles may not include any evidence directly proving the state of mind of the maker or makers of the document (for instance, their instructions for preparing it, statements as to what he or they intended to do<sup>15</sup>, and his or their known or secret views, likes and dislikes, prejudices and opinions<sup>16</sup>, or drafts of the document or the past history of negotiations leading up to it<sup>17</sup>, or any evidence that the maker or makers of the document habitually used ordinary words in a sense peculiar to himself or themselves, unless he or they shared this usage with a sizeable class of persons<sup>18</sup> or the words can be shown to form a code intended to prevent their being correctly understood by unauthorised persons<sup>19</sup>).

1 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[1997] AC 749 at 775, [1997] 3 All ER 352 at 376, HL, per Lord Hoffmann; *Investors Compensation Scheme Ltd v West Bromwich Building Society*[1998] 1 All ER 98 at 114-115, [1998] 1 WLR 896 at 912-913, HL, per Lord Hoffmann. See also PARAS 164-166 ante.

2 See PARA 165 ante.

3 See PARA 209 post. Surrounding circumstances, however strong, will not, it seems, prevail over clear language in the instrument: *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*[1915] AC 207, HL; *Grigsby v Melville*[1973] 3 All ER 455, [1974] 1 WLR 80, CA (evidence of circumstances surrounding transaction not admissible to contradict plain language of conveyance).

4 The evidence to enable the court to discover the meaning of the terms of the written document, and to apply them to the facts: *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555, HL, per Parke B. By 'meaning' is meant either the ordinary or some special meaning; not the particular meaning, varying from such ordinary or special meaning, which the author of the document may have had in view. See *Henry Boot & Sons Ltd v LCC*[1959] 1 All ER 77 at 79-80, [1959] 1 WLR 133 at 137-138, CA; on appeal sub nom *LCC v Henry Boot & Sons Ltd*[1959] 3

All ER 636 at 640-641, [1959] 1 WLR 1069 at 1075-1077, HL (on the question whether holiday credits fell within the expression 'rates of wages' in a rise and fall clause in a building contract, previous views expressed by the London County Council to the other party to the contract, either directly or through the builders' trade association, as to the meaning of the expression in the standard form of contract employed held irrelevant); and see PARA 203 note 3 post.

5 Extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received: *Inglis v John Buttery & Co*(1878) 3 App Cas 552, HL (surrounding circumstances to be considered, but not the communings of the parties); *Bank of New Zealand v Simpson*[1900] AC 182 at 188, PC; *Cameron v Wiggins*[1901] 1 KB 1, DC (initial letters N M added to invoice as description of the goods at request of the purchaser); *Van Diemen's Land Co v Table Cape Marine Board*[1906] AC 92, PC; *Charrington & Co Ltd v Woode*[1914] AC 71, HL; *Janson v Poole* (1915) 84 LJKB 1543 (extrinsic evidence admitted to identify insurance policy which had been reinsured); *Watcham v A-G of East Africa Protectorate*[1919] AC 533, PC (acts of user before grant to explain what was granted); *Laprairie Common Corp v Compagnie de Jésus*[1921] 1 AC 314 at 323, PC (other documents of like date admitted to explain sense in which words were used in an ancient grant); *White v Taylor (No 2)*[1969] 1 Ch 160 at 180, 183, [1968] 1 All ER 1015 at 1025, 1027 per Buckley J. However, where the document is modern, and the meaning can be discovered by construction, extrinsic evidence is inadmissible: *Re Duncan and Pryce* [1913] WN 117 at 118; *Davies v Powell Duffryn Steam Coal Co Ltd* (1920) 36 TLR 358 at 359 (affd (1921) 91 LJ Ch 40, CA). In relation to wills see WILLS vol 50 (2005 Reissue) PARA 481 et seq.

6 *Doe d Norton v Webster* (1840) 12 Ad & El 442; *Lyle v Richards*(1866) LR 1 HL 222; *Fox v Clarke*(1874) LR 9 QB 565, Ex Ch; *Plant v Bourne*[1897] 2 Ch 281, CA; and see BOUNDARIES vol 4(1) (2002 Reissue) PARA 929. Previous acts of user by a grantee from the Crown are admissible where the grant is in confirmation of such user: see *Van Diemen's Land Co v Table Cape Marine Board*[1906] AC 92, PC. In *Watcham v A-G of East Africa Protectorate*[1919] AC 533, evidence of user was admitted to explain what was granted, but this is in general not allowed in a modern grant: see PARA 206 post.

7 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 580, HL, per Lord Cottenham; *River Wear Comrs v Adamson*(1877) 2 App Cas 743 at 763, HL, per Lord Blackburn.

8 *Mason v Cole*(1849) 4 Exch 375 (building scheme); *Mumford v Gething* (1859) 7 CBNS 305; *Stucley v Baily* (1862) 1 H & C 405; *Cave v Hastings*(1881) 7 QBD 125; *Spicer v Martin*(1888) 14 App Cas 12, HL (restrictive covenants in lease; similar covenants in other leases of premises forming part of the same block of buildings); *Oliver v Hunting*(1890) 44 ChD 205; *Olympia Oil and Cake Co Ltd v North-Eastern Ry Co* (1913) 30 TLR 236 (evidence of existing rates considered before making agreement in respect of rates for traffic over railway siding); *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd*[1969] 3 All ER 1441, [1970] 1 WLR 52 (where certain letters were admitted as part of the surrounding circumstances in order to show the general object of the transaction and hence the precise meaning of a phrase in a lease). The extent of a repairing covenant in a lease must be measured by the age and class of the buildings demised, and evidence of the state of the premises may be given: *Payne v Haine* (1847) 16 M & W 541; *Proudfoot v Hart*(1890) 25 QBD 42, CA; and see *Burges v Wickham* (1863) 3 B & S 669. As to the precise meaning of a covenant in a lease to use the demised premises for business purposes only see *City and Westminster Properties (1934) Ltd v Mudd*[1959] Ch 129, [1958] 2 All ER 733 (held permissible to consider the nature of the premises and, if they had been adapted in part for use as a residence, the operation of the covenant might have been confined to the part in fact used as business premises; but inadmissible to consider the past history of the matter, and hence it was irrelevant that the tenant had, before the grant of the lease in question, habitually slept on the premises to the knowledge of the landlord); and cf *Levermore v Jobey*[1956] 2 All ER 362, [1956] 1 WLR 697, CA. As to proof of surrounding circumstances to show the nature and extent of a guarantee see eg *Heffield v Meadows*(1869) LR 4 CP 595; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq. As to proof of such circumstances to explain the meaning of terms in marine policies see eg *Houlder Bros & Co Ltd v Public Works Comr, Public Works Comr v Houlder Bros & Co Ltd*[1908] AC 276, PC; and INSURANCE vol 25 (2003 Reissue) PARA 228.

9 'In construing all instruments, you must know what the facts were when the agreement was entered into': *Cannon v Villars*(1878) 8 ChD 415 at 419 per Jessel MR; and see *Smith v Doe d Jersey* (1821) 2 Brod & Bing 473 at 550 per Bayley J; *Shore v Wilson* (1842) 9 Cl & Fin 355 at 512, HL, per Erskine J; *Earl of Bradford v Earl of Romney* (1862) 30 Beav 431 at 436; *Sidebotham v Knott* (1872) 20 WR 415; *Bulstrode v Lambert*[1953] 2 All ER 728 at 730-731 per Upjohn J; *Tophams Ltd v Earl of Sefton*[1967] 1 AC 50 at 63, [1966] 1 All ER 1039 at 1041-1042, HL, per Lord Hodson. The evidence of surrounding circumstances of a contract should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction: *Prenn v Simmonds*[1971] 3 All ER 237, [1971] 1 WLR 1381, HL. For the purpose of ascertaining rights under an employees' insurance scheme established by trust deed, the court looked at a booklet issued by the employers in connection with the scheme: *Bowskill v Dawson*[1955] 1 QB 13 at 28, [1954] 2 All ER 649 at 659, CA, per Romer LJ. See also *Charrington & Co Ltd v Woode*[1914] AC 71, HL, where evidence of surrounding circumstances was admitted for the purpose of construing the term 'market' with reference to a particular trade in a stipulation for the supply of goods at 'the fair market price'. The court cannot, however, receive evidence for the purpose of contradicting a

document which is unambiguous: *Davies v Powell Duffryn Steam Coal Co* (1920) 36 TLR 358; affd (1921) 91 LJ Ch 40, CA.

10 *Hart v Hart* (1881) 18 ChD 670 at 693 per Kay J; and see *Shore v Wilson* (1842) 9 Cl & Fin 355 at 556, HL, per Lord Wensleydale; *A-G v Drummond* (1842) 1 Dr & War 353 at 367 per Sugden LC; *Grey v Pearson* (1857) 6 HL Cas 61 at 106; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 876; *Baird v Fortune* (1861) 5 LT 2, HL. See also *Magee v Lavell* (1874) LR 9 CP 107 at 112; and *Roe v Siddons* (1888) 22 QBD 224 at 233, CA, per Lord Esher MR ('the deed must be construed according to the ordinary rules of construction, one of which is that you are entitled to look at the circumstances existing at the date of the deed'); *Butterley Co Ltd v New Hucknall Colliery Co Ltd* [1909] 1 Ch 37 at 46, 52, CA (affd [1910] AC 381, HL).

11 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989, HL; *Bunge SA v Kruse* [1977] 1 Lloyd's Rep 492, CA; *Earl of Lonsdale v A-G* [1982] 3 All ER 579, [1982] 1 WLR 887; *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277, CA; *Barclays Bank plc v Weeks Legg & Dean (a firm)* [1999] QB 309, [1998] 3 All ER 213, CA.

12 *Inglis v John Buttery & Co* (1878) 3 App Cas 552 at 577, HL, per Lord Blackburn. Thus, in ascertaining the premises granted by a lease, the parties have a right to prove all the circumstances connected with the state of the property at the time of the demise: *Osborn v Wise* (1837) 7 C & P 761; *Hall v Lund* (1863) 1 H & C 676 at 684. The circumstances, by explaining the relative position of the parties (eg which is buyer and which is seller) may remove an ambiguity in the contract: *Newell v Radford* (1867) LR 3 CP 52.

13 See PARA 176 ante. As to cases where the question may be complicated by the application of the Statute of Frauds (1677) s 4 (as amended) (replaced and repealed for certain purposes: see PARA 141 note 1 ante) or the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) see SALE OF LAND vol 42 (Reissue) PARAS 29-40. See also *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Rep 423.

14 *Harman v Richards* (1852) 10 Hare 81 at 85; *Graham v O'Keefe* (1864) 16 I Ch R 1; and see generally SALE OF LAND.

15 See PARA 185 notes 2, 8 ante. However, a second document containing such statements (and complying with any requisites of the law as to form) may fall to be construed together and so as to form in effect one document with that to be interpreted: see PARA 176 ante.

16 'In no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument whether religious, political or otherwise, any more than by the expressed parol declarations made by the party himself which are universally excluded': *Shore v Wilson* (1842) 9 Cl & Fin 355 at 565, HL, per Tindal CJ.

17 See PARAS 185 note 3, 187 ante.

18 See PARAS 170 note 5, 172-173 ante, 202-203 post. It may be shown from internal evidence that the maker or makers of a document is or are using an ordinary word in a sense peculiar to himself or themselves or to the document alone; for instance, the document may contain definitions of words in artificial senses, and a definition may be implied by obvious use of a word throughout the document in a special or peculiar sense: see *Re Davidson, National Provincial Bank Ltd v Davidson* [1949] Ch 670, [1949] 2 All ER 551; paras 170, 174 ante; and WILLS vol 50 (2005 Reissue) PARA 481 et seq.

19 See PARA 200 note 4 post.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(3) ADMISSION OF EXTRINSIC EVIDENCE/(ii) To Explain the Meaning and Application of Words/199. Other instances where extrinsic evidence admissible.

### 199. Other instances where extrinsic evidence admissible.

The following are further examples of admissibility of extrinsic evidence: to identify the parties<sup>1</sup> or property<sup>2</sup> named or described in a written agreement; to identify documents referred to therein<sup>3</sup>; to show the circumstances of the parties from which their relative positions in relation to the contract may be inferred<sup>4</sup>; to prove circumstances from which may be inferred the extent of the property intended to pass by a certain description<sup>5</sup>, the nature of the employment intended in such a phrase as 'in consideration of my entering your employ'<sup>6</sup>, or the construction of the words 'market price' in a covenant for sale of liquor in a brewer's lease<sup>7</sup>; or to prove circumstances tending to show that representations in letters forming the contract which might be construed as warranties were not intended as such<sup>8</sup>. Where the question was whether the purposes of a trust were exclusively charitable or whether they were or included political purposes, it was held that, the trust deed being ambiguous, in determining the question it was proper to look at the surrounding facts, including the activities of the promoters both before and after the execution of the deed<sup>9</sup>. A letter from a landlord to his tenant has been held as a matter of construction, in the light of all the surrounding circumstances, to operate as a consent enabling the tenant to change the use of the premises<sup>10</sup>.

Extrinsic evidence is also admissible to rebut a presumption such as that of trust or advancement<sup>11</sup>. This principle does not form an exception to the general rule already stated<sup>12</sup>, since the evidence is admitted not to modify the written instrument in any way, but to support the instrument in its natural sense against the artificial construction placed upon it by equity<sup>13</sup>.

1 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 556, HL, per Parke B; *Rayner v Grote* (1846) 15 M & W 359; *Newell v Radford* (1867) LR 3 CP 52; *Sale v Lambert* (1874) LR 18 Eq 1; *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Carr v Lynch* [1900] 1 Ch 613; *Chapman v Smith* [1907] 2 Ch 97; *Fred Drughorn Ltd v Rederiaktiebolaget Trans-Atlantic* [1919] AC 203, HL.

2 *Ogilvie v Foljambe* (1817) 3 Mer 53; *Paddock v Fradley* (1830) 1 Cr & J 90; *Owen v Thomas* (1834) 3 My & K 353; *R v Wickham Inhabitants* (1835) 2 Ad & El 517; *Shore v Wilson* (1842) 9 Cl & Fin 355, HL; *Cowley v Watts* (1853) 17 Jur 172; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 at 678 per Lord Chelmsford; *Macdonald v Longbottom* (1860) 1 E & E 977 at 987, Ex Ch; *Lyle v Richards* (1866) LR 1 HL 222; *McMurray v Spicer* (1868) LR 5 Eq 527; *Horsev v Graham* (1869) LR 5 CP 9; *Shardlow v Cotterell* (1881) 20 ChD 90, CA; *Plant v Bourne* [1897] 2 Ch 281, CA; *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92, PC; *EW Savory Ltd v World of Golf Ltd* [1914] 2 Ch 566, CA; *Auerbach v Nelson* [1919] 2 Ch 383; *Freeguard v Rogers* [1999] 1 WLR 375, (1998) Times, 22 October, CA.

3 *Hodges v Horsfall* (1829) 1 Russ & M 116 (identification of plan referred to); *Morris v Wilson* (1859) 5 Jur NS 168; *Jones v Victoria Graving Dock Co Ltd* (1877) 2 QBD 314, CA (identification of draft agreement as being that referred to in resolution entered in minute book); *Long v Millar* (1879) 4 CPD 450, CA; *Dewar v Mintoft* [1912] 2 KB 373. Extrinsic evidence is also admissible to prove the connection between two documents such as a letter and the envelope inclosing it: *Pearce v Gardner* [1897] 1 QB 688, CA.

4 *Newell v Radford* (1867) LR 3 CP 52.

5 *Doe d Freeland v Burt* (1787) 1 Term Rep 701; *Goodtitle d Radford v Southern* (1813) 1 M & S 299; *Duke of Beaufort v Swansea Corp* (1849) 3 Exch 413; *Thomas v Owen* (1887) 20 QBD 225, CA; *Willson v Greene* [1971] 1 All ER 1098, [1971] 1 WLR 635; *Spall v Owen* (1981) 44 P & CR 36 at 43 per Gibson J; *Targett v Ferguson* (1996) 72 P & CR 106, CA; *Freeguard v Rogers* [1999] 1 WLR 375, (1998) Times, 22 October, CA.

6 *Mumford v Gething* (1859) 7 CBNS 305 (previously employed by same employer under an oral agreement).

7 *Charrington & Co Ltd v Wooder* [1914] AC 71, HL. For other cases on the admissibility of evidence to explain words and phrases see *Daintree v Hutchinson* (1842) 10 M & W 85 (initial letters); *Grant v Maddox*

(1846) 15 M & W 737 (trade terms); *Doe d Mence v Hadley* (1849) 14 LTOS 102 (land 'marked out'); *Hawk v Freund* (1858) 1 F & F 294 ('same or usual terms'); *Mumford v Gething* (1859) 7 CBNS 305 ('the same ground'); *Albert v Grosvenor Investment Co* (1867) LR 3 QB 123 ('default' in payment of money secured by a bill of sale); *Roots v Snelling* (1883) 48 LT 216 ('freehold equities'); *Bank of New Zealand v Simpson* [1900] AC 182, PC ('total cost of works'). As to when a secondary meaning of a word is admissible see PARA 170 note 3 ante. As to latent ambiguity see PARA 209 post.

8 *Stucley v Baily* (1862) 1 H & C 405.

9 *Southwood v A-G* [1998] 40 LS Gaz R 37.

10 *Rose v Stavrou* [1999] 25 LS Gaz R 29 (letter construed by reference to documents in other cases, in similar terms and circumstances).

11 See EQUITY vol 16(2) (Reissue) PARA 750; TRUSTS vol 48 (2007 Reissue) PARAS 651, 707, 726; WILLS vol 50 (2005 Reissue) PARA 481 et seq.

12 See PARA 185 ante.

13 See *Lord Chichester v Coventry* (1867) LR 2 HL 71; *Re Lacon, Lacon v Lacon* [1891] 2 Ch 482, CA; *Pryor v Petre* [1894] 2 Ch 11, CA.

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**200. Ascertainment of ordinary meanings of words.**

The rules already laid down as to the meaning to be ascribed to words<sup>1</sup> indicate the nature of the extrinsic evidence which can be adduced to arrive at their meaning. Primarily words are to be taken in their ordinary popular sense<sup>2</sup>. The court takes judicial notice of the ordinary meaning and, where there is any doubt, may have recourse to dictionaries<sup>3</sup> to ascertain the meaning commonly used by the author of the instrument<sup>4</sup>, but a mere obscurity of handwriting is for the court to solve<sup>5</sup>.

1 See PARAS 169-174 ante.

2 See PARA 169 ante.

3 See an early example of recourse to a dictionary in *Matthew v Purchins* (1608) Cro Jac 203.

4 *Kell v Charmer* (1856) 23 Beav 195.

5 *Remon v Hayward* (1835) 2 Ad & El 666.



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## **201. Construction of foreign documents.**

The construction of a foreign document by the application to it of the foreign law, when ascertained, is for the judge, and not for the witness. Where a written contract is made in a foreign country, and in a foreign language, evidence is admissible to show what is the corresponding meaning in English<sup>1</sup>. Accordingly the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance, the court itself must interpret the contract on ordinary principles of construction<sup>2</sup>.

1 *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555, HL, per Parke B. Where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue: see *Shore v Wilson* supra at 511 per Erskine J, and at 566 per Tindal CJ.

2 *Di Sora v Philipps* (1863) 10 HL Cas 624 at 633 per Lord Cranworth; *Russian Commercial and Industrial Bank v Comptoir D'Escompte De Mulhouse* [1923] 2 KB 630 at 643, CA (on appeal [1925] AC 112, HL); and cf *Stearine Kaarsen Fabrick Gonda Co v Heintzmann* (1864) 17 CBNS 56; *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 QB 79, CA; *Serra v Famous Lasky Film Service* (1922) 127 LT 109, CA; *Rouyer Guillet et Cie v Rouyer Guillet & Co Ltd* [1949] 1 All ER 244n, CA. As to foreign legislation see *De Beêche v South American Stores Ltd and Chilian Stores Ltd* [1935] AC 148, HL. See also *H Glynn (Covent Garden) Ltd v Wittleder* [1959] 2 Lloyd's Rep 409 (where it was decided, having regard to the course of negotiations for a contract, that the parties were not bound by the untranslated terms in a German form of contract note, of which part only had been translated into English). As to admissible evidence of foreign law in civil proceedings see the Civil Evidence Act 1972 s 4; and CIVIL PROCEDURE vol 11 (2009) PARAS 1085, 1088.

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## **202. Terms of science and art.**

Technical words are primarily to be taken in their technical sense<sup>1</sup>; and where the words are technical terms of science or art, the evidence of experts, or of books dealing with the subject, is admissible to inform the court of their meaning<sup>2</sup>. If, however, there is no dispute or the matter is simple, the court will take judicial notice of the meaning of technical terms of a scientific or technological nature, using any reliable means for informing itself. Thus the court may act on the explanations of counsel or may refer to technical textbooks or previously reported decisions, or may rely on its own knowledge, particularly where the court is sitting with assessors, who are experts in the technical matters involved<sup>3</sup>.

The court requires no evidence as to technical legal terms<sup>4</sup>.

<sup>1</sup> See PARA 170 ante.

<sup>2</sup> *Shore v Wilson* (1842) 9 Cl & Fin 355 at 511, HL, per Erskine J, and at 566 per Tindal CJ (if the terms are technical terms of art, their meaning must be ascertained by the evidence of persons skilled in the art to which they refer); *Glaverbel SA v British Coal Corp* [1995] FSR 254, [1995] RPC 255, CA. 'Patent specifications are intended to be read by persons skilled in the relevant art, but their construction is for the [c]ourt. Thus the court must adopt the mantle of the notional skilled addressee and determine, from the language used, what the notional skilled addressee would understand to be the ambit of the claim. To do that it is often necessary for the [c]ourt to be informed as to the meaning of technical words and phrases and what was, at the relevant time, the common general knowledge; the knowledge that the notional skilled man would have': *Lubrizol Corp v Esso Petroleum Co Ltd (No 5)* [1998] RPC 727 at 738, CA, per Aldous LJ. See also *Goblet v Beechey* (1829) 3 Sim 24; revsd (1831) 2 Russ & M 624 (a case on a will). An expert may, in giving evidence, refer the court to technical textbooks as setting out his expert knowledge.

<sup>3</sup> *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at 679, [1959] 2 All ER 433 at 438-439, HL, per Lord Morton, at 684-685 and 442 per Lord Reid, and at 691 and 446 per Lord Denning. As to the appointment of assessors and scientific advisers in patent cases see the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 70; and CIVIL PROCEDURE vol 11 (2009) PARA 863; CIVIL PROCEDURE vol 12 (2009) PARA 1133.

<sup>4</sup> *Shore v Wilson* (1842) 9 Cl & Fin 355 at 512, HL, per Erskine J; *Roddy v Fitzgerald* (1858) 6 HL Cas 823 at 877 per Lord Wensleydale (as to wills); *Biggs v Gordon* (1860) 8 CBNS 638; *Leach v Jay* (1877) 6 ChD 496 at 499 per Jessel MR (affd (1878) 9 ChD 42, CA); *Smith v Butcher* (1878) 10 ChD 113 at 114.

## **UPDATE**

## **202 Terms of science and art**

NOTE 3--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(3) ADMISSION OF EXTRINSIC EVIDENCE/(ii) To Explain the Meaning and Application of Words/203. Local or class usage.

### 203. Local or class usage.

Where a word or phrase has a special meaning in a particular district or among a particular class, evidence of the special meaning may be given<sup>1</sup>, as may evidence that the person using it resided in such a district or belonged to such a class<sup>2</sup>. The evidence must refer to the general use of the word, and must lead to the conclusion that the author used the term in the particular instrument in the suggested sense; it must not be direct evidence that in the particular instrument he intended to use the word in some sense differing from its ordinary meaning<sup>3</sup>. Moreover, evidence of this kind must not contradict the provisions of the deed; its effect must be limited to explaining them<sup>4</sup>.

Evidence of the special meaning of words is frequently admitted in the case of mercantile contracts, where words may bear a meaning attributed to them by local usage or by the custom of the trade<sup>5</sup>.

1 Extrinsic evidence is admissible 'where technical words or peculiar terms, or indeed any expressions are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes': see *Smith v Wilson* (1832) 3 B & Ad 728 at 733 per Parke J; *Shore v Wilson* (1842) 9 Cl & Fin 355 at 555, HL; *Grant v Maddox* (1846) 15 M & W 737 at 745 per Alderson B; *Re North Western Rubber Co Ltd and Hüttenbach & Co* [1908] 2 KB 907 at 923, CA, per Buckley LJ; *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at 88, CA, per Cozens-Hardy MR. Such evidence is equivalent to translation: *Grant v Maddox* (1846) 15 M & W 737 at 746 per Platt B. As to local meaning of terms of measurement see *Barksdale v Morgan* (1693) 4 Mod Rep 185 at 186 ('acre'). 'One thousand', as applied to rabbits, has been held in a particular district to mean 1,200: *Smith v Wilson* (1832) 3 B & Ad 728. In a mining lease 'level' has been construed in the particular sense in which it was used by miners in the neighbourhood: *Clayton v Gregson* (1836) 5 Ad & El 302. Similarly, terms which have acquired a peculiar sense in a particular trade are to be construed according to that sense: *Robertson v French* (1803) 4 East 130 at 135.

2 In *Shore v Wilson* (1842) 9 Cl & Fin 355 at 528, 530, 550, 580, HL, the question was as to the meaning of the expression 'godly preachers of Christ's Holy Gospel' as used by Lady Hewley in a deed of 1704; evidence was admitted of the existence of a class of Trinitarian Protestant Dissenters by whom this phrase was used to denote their own ministers, and that Lady Hewley was a member of this party; consequently both Unitarians and Church of England clergymen were excluded. As to 'Protestant Dissenters' cf *Drummond v A-G for Ireland* (1849) 2 HL Cas 837.

3 'Evidence of the particular meaning which the party affixed to his words' cannot be set up 'to contradict or vary the plain language of the instrument itself': see *Shore v Wilson* (1842) 9 Cl & Fin 355 at 566, HL, per Tindal CJ, at 514 per Erskine J, and at 525 per Coleridge J; *Drummond v A-G for Ireland* (1849) 2 HL Cas 837 at 863.

4 *A-G v Clapham* (1855) 4 De GM & G 591 at 627.

5 'For there to be any relevance in any custom or practice, whether in a strict or informal sense, it must be possible to identify the particular custom or practice with some certainty': *Roar Marine Ltd v Bimeh Iran Insurance Co* [1998] 1 Lloyd's Rep 423 at 429 per Mance J. As to the admissibility of usage in the interpretation of mercantile contracts see further CUSTOM AND USAGE vol 12(1) (Reissue) PARA 665 et seq.

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#### **204. Ancient documents.**

Where the instrument is of ancient date, then, whether the words are taken in their ordinary popular sense, or are taken in the sense given to them by a particular place, evidence will be admitted of the meaning of the words at the date of the instrument<sup>1</sup>, and such evidence may properly be given by reference to historical and other works<sup>2</sup>.

<sup>1</sup>     le where by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed: *Shore v Wilson* (1842) 9 Cl & Fin 355 at 566, HL, per Tindal CJ, at 512-513 per Erskine J, at 527-528 per Coleridge J, at 545 per Gurney B, and at 556 per Parke B; *Drummond v A-G for Ireland* (1849) 2 HL Cas 837 at 863 per Lord Campbell. As to evidence of conduct to explain an ancient document see PARA 206 post.

<sup>2</sup>     *Shore v Wilson* (1842) 9 Cl & Fin 355 at 501-502, HL, per Maule J.

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## **205. Identification.**

When the meaning of the words of the instrument has been ascertained, whether their ordinary popular meaning or their special meaning (the special meaning being determined by the context or by extrinsic evidence), it is still necessary to ascertain the particular persons or things to which, in accordance with such meaning, they apply, and this involves the admission of such evidence as is necessary to identify the person or thing mentioned in the instrument<sup>1</sup>.

<sup>1</sup> For the purpose of applying the instrument to the facts, and determining what passes by it, and who takes an interest under it, a second description of evidence is admissible, namely every material fact that will enable the court to identify the person or thing mentioned in the instrument: *Shore v Wilson* (1842) 9 Cl & Fin 355 at 556, HL, per Parke B; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 at 678 per Lord Chelmsford; and see PARAS 198-199 ante.

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### (iii) Evidence of Conduct and Contemporaneous Usage

#### 206. Evidence of conduct.

If, after other methods of interpretation have been exhausted, there remains a doubt as to the effect of an ancient instrument<sup>1</sup>, it is permissible to give evidence of the acts done under it as a guide to the intention of the parties<sup>2</sup>, in particular, of acts done shortly after the date of the instrument<sup>3</sup>. Evidence of the acts done cannot, however, be admitted to contradict the clear meaning of the instrument<sup>4</sup>. An ancient instrument, for the present purpose, appears to be one that dates from beyond the time of living memory<sup>5</sup>.

This doctrine probably also applies to descriptions of the property assured in modern instruments of title to land<sup>6</sup>, but with this exception acts done under a modern instrument and, in particular, under a modern commercial contract cannot be admitted as a guide to the intention of the parties, even if there remains a doubt after other methods of interpretation have been exhausted<sup>7</sup>.

1 As to the interpretation of words in an ancient document see PARA 204 ante.

2 'In the construction of ancient grants and deeds, there is no better way of construing them than by usage': *A-G v Parker* (1747) 3 Atk 576 at 577 per Lord Hardwicke LC; 9 Co Rep 28a, n (F). 'One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means': *A-G v Drummond* (1842) 1 Dr & War 353 at 368 per Sugden LC; and see *Drummond v A-G for Ireland* (1849) 2 HL Cas 837 at 861 per Lord Cottenham, and at 863 per Lord Campbell. 'If the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties': *Doe d Pearson v Ries* (1832) 8 Bing 178 at 181 per Tindal CJ; and see *Chapman v Bluck* (1838) 4 Bing NC 187 at 193; *Wadley v Bayliss* (1814) 5 Taunt 752; *A-G v Brazen Nose College* (1834) 2 Cl & Fin 295 at 317; *Sadler v Biggs* (1853) 4 HL Cas 435 at 458; *Hebbert v Purchas* (1871) LR 3 PC 605 at 650; *Laprairie Common Corp v Compagnie de Jésus* [1921] 1 AC 314 at 323, PC (where, in construing a feudal grant of 1694 to the inhabitants of a village, notice was taken of agreements of 1705 and 1724 relating to the effect of the grant). As to charities see *A-G v Bristol Corp* (1820) 2 Jac & W 294 at 321; *A-G v Boston Corp* (1847) 1 De G & Sm 519 at 527; and CHARITIES vol 8 (2010) PARAS 110-112.

3 This principle is expressed in the maxim 'contemporanea expositio est fortissima in lege': 2 Co Inst 136.

4 In the case of a grant no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage: *Chad v Tilsed* (1821) 2 Brod & Bing 403 at 406 per Dallas CJ; and see *R v Varlo* (1775) 1 Cowp 248 at 250 per Lord Mansfield CJ. Usage cannot repeal the positive enactment of a statute: *Lord Advocate v Walker Trustees* [1912] AC 95 at 103, HL; cf *Clifton v Walmesley* (1794) 5 Term Rep 564; *Forbes v Watt* (1872) LR 2 Sc & Div 214, HL; *North Eastern Rly Co v Lord Hastings* [1900] AC 260 at 263, 270, HL; and see *Marshall v Berridge* (1881) 19 ChD 233, CA.

In determining whether a covenant in a lease amounted to a covenant for perpetual renewal, the Court of Chancery refused to admit evidence of the conduct of the parties, on the ground that a covenant for perpetual renewal must be perfectly clear: *Baynham v Guy's Hospital* (1796) 3 Ves 295; not following the decision of the King's Bench in *Cooke v Booth* (1778) 2 Cowp 819. The controversy arising out of this incident induced declarations in the Court of Chancery that evidence of conduct was never admissible: *Baynham v Guy's Hospital* supra; *Eaton v Lyon* (1798) 3 Ves 690 at 694; *Iggulden v May* (1804) 9 Ves 325; *Balfour v Welland* (1809) 16 Ves 151 at 156; and see *Douglas v Allen* (1842) 1 Con & Law 367; *Burrowes v Hayes* (1834) Hayes & Jo 597. As to the abolition of perpetually renewable leases as such see the Law of Property Act 1922 s 145, Sch 15 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 541-542.

5 See *North Eastern Rly Co v Lord Hastings* [1900] AC 260 at 269, HL, per Lord Davey; and see the same case in the court below, sub nom *Lord Hastings v North Eastern Rly Co* [1899] 1 Ch 656 at 663, CA, per Lindley

MR (where 'contemporanea expositio' is relied on upon the ground that the meaning of the words has changed, the instrument must be old enough to permit of this change).

6 *Watcham v A-G of East Africa Protectorate*[1919] AC 533, PC, explained in *L Schüler AG v Wickman Machine Tool Sales Ltd*[1974] AC 235, [1973] 2 All ER 39, HL; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*[1973] 3 All ER 902, [1973] 1 WLR 1572; and see *Neilson v Poole* (1969) 20 P & CR 909.

7 In *Watcham v A-G of East Africa Protectorate*[1919] AC 533, PC, it was held by the Judicial Committee that, in cases of ambiguity, whether patent or latent, evidence of user can be given, to show the sense in which the parties used the language employed, in construing a modern as well as an ancient instrument. This view was also advanced in *Van Diemen's Land Co v Table Cape Marine Board*[1906] AC 92 at 98, PC, and in *WT Lamb & Sons v Goring Brick Co Ltd*[1932] 1 KB 710 at 717, 721, CA. The dictum of Tindal CJ in *Doe d Pearson v Ries* (1832) 8 Bing 178 at 181 (cited in note 2 supra), also referred to a modern instrument. This extension of the doctrine has not met with approval: see *Gaisberg v Storr*[1949] 2 All ER 411 at 415, CA; and PARA 187 note 4 ante. Finally, in *L Schüler AG v Wickman Machine Tool Sales Ltd*[1974] AC 235, [1973] 2 All ER 39, the House of Lords held that the doctrine was not applicable to modern instruments, reserving however the question whether it could exceptionally be applied to a case (such as *Watcham v A-G of East Africa Protectorate* supra) where the instrument concerned was an instrument of title to land. The House of Lords had previously considered the question of admissibility of conduct under a modern instrument (though without reference to *Watcham v A-G of East Africa Protectorate* supra) in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*[1970] AC 583, [1970] 1 All ER 796. See also *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772 [1975] 1 WLR 468, CA.

See, however, *Manitoba Development Corp v Columbia Forest Products Ltd* (1973) 43 DLR (3d) 107, Man CA (where the English authorities were reviewed but the court decided that in an appropriate case, where there is ambiguity, it is permissible to examine the subsequent conduct of the parties (meaning of the phrase 'all necessary working capital' in issue)); *Boranga v Flintoff* (1997) 19 WAR 1. See also *Maggs (t/a BM Builders) v Marsh*[2006] EWCA Civ 1058, [2006] BLR 395, [2006] All ER (D) 95 (Jul), where it was held that the principle that what the parties had done or said after the contract date could not be considered in construing the terms of a written contract did not apply to an oral contract or the oral aspects of a partially written and partially oral contract (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* was distinguished).

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## 207. Contemporaneous usage.

Before evidence of contemporaneous usage can be admitted there must be a doubt on the construction of the instrument, either by reason of the occurrence of general words<sup>1</sup> or because, in consequence of lapse of time, the words may have changed their meaning<sup>2</sup>, or on account of some other uncertainty or ambiguity<sup>3</sup>.

The evidence is not restricted to direct evidence of contemporaneous usage, which it would frequently be impossible to procure. Modern usage, if there is nothing to countervail it, raises a presumption that the usage was the same immediately after the date of the instrument, and consequently evidence of modern usage is admissible to explain an ancient deed<sup>4</sup>.

1 When a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it: *Chad v Tilsed* (1821) 2 Brod & Bing 403 at 406 per Dallas CJ. 'However general the words of the ancient deeds may be, they are to be construed by evidence of the manner in which the thing has been always possessed and used': *Weld v Hornby* (1806) 7 East 195 at 199 per Lord Ellenborough CJ; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 at 680 per Lord Cranworth.

2 See *Lord Hastings v North Eastern Rly Co* [1899] 1 Ch 656 at 663, CA, per Lindley MR; affd sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL. Thus, in ascertaining the meaning of terms in an ancient trust deed at the time of execution, evidence is admissible of 'the early and contemporaneous application of the funds of the charity itself by the original trustees': *Shore v Wilson* (1842) 9 Cl & Fin 355 at 569, HL, per Tindal CJ.

3 There can be no doubt that contemporaneous usage may be resorted to for the purpose of explaining an uncertainty or ambiguity in an ancient grant; but then there must be 'uncertainty or ambiguity': *Lord Hastings v North Eastern Rly Co* [1899] 1 Ch 656 at 661, CA, per Vaughan Williams LJ (affd sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL); *Doe d Kinglake v Beviss* (1849) 7 CB 456 at 504; *Earl De La Warr v Miles* (1881) 17 ChD 535 at 573, CA.

4 *Chad v Tilsed* (1821) 2 Brod & Bing 403; *Duke of Beaufort v Swansea Corp*n (1849) 3 Exch 413 at 425; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 at 684; *Simpson v Dendy* (1860) 8 CBNS 433 at 473 (affd sub nom *Dendy v Simpson* (1861) 7 Jur NS 1058, Ex Ch); *Hastings Corp*n v *Ivall* (1874) LR 19 Eq 558 at 581; *Earl De La Warr v Miles* (1881) 17 ChD 535 at 573, CA. Similarly, in a question of prescription, usage continued during living memory, when there is nothing to the contrary, may justify the presumption of a similar usage from time immemorial: *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 156, HL, per Lord Selborne LC. Modern usage, carried back for a considerable time, may be used to interpret a doubtful statute, if not inconsistent with the express directions of the statute: *Dunbar Magistrates v Duchess of Roxburghe* (1835) 3 Cl & Fin 335 at 354, HL.



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#### (iv) Ambiguity

##### 208. Patent and other ambiguities.

When the meaning of the words of the instrument has been ascertained by intrinsic evidence, and by such extrinsic evidence as is admissible for that purpose (other than evidence admissible only to resolve a latent ambiguity<sup>1</sup>), it may be that the instrument as thus interpreted fails to indicate with certainty any specific intention on the part of the author. Where the instrument as so interpreted has two or more possible meanings it is said to be ambiguous. If, before an attempt is made to identify the persons and things referred to in the instrument, it is apparent on the face of the instrument that it is ambiguous, the ambiguity is called a patent ambiguity. Such an ambiguity may, for instance, arise because the author has contradicted himself, or has expressed alternative intentions without deciding in favour of either, or has omitted something necessary completely to define his meaning<sup>2</sup>. It has been said that where there is an ambiguity a contract should not be construed in such a way as to bar a legitimate claim<sup>3</sup>.

No direct evidence of intention can be given to resolve an ambiguity other than a latent ambiguity<sup>4</sup>. To allow such evidence would be regarded as infringing the rule that the terms of a written instrument cannot be varied or contradicted by extrinsic evidence<sup>5</sup>. Sometimes a patent ambiguity may be cured by election<sup>6</sup>, and where there is a patent ambiguity on the face of a lease, reference may be made to a counterpart to resolve it<sup>7</sup>. A latent ambiguity may be resolved by the further evidence admissible to solve such an ambiguity, but otherwise an ambiguous deed is, either as to the whole of the deed or, where the ambiguity occurs in a severable part of the deed, as to that part, void for uncertainty<sup>8</sup>.

1 As to latent ambiguities and the evidence admissible to resolve them see PARA 209 post.

2 'There be two sorts of ambiguities of words; the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity': Bacon's Law Tracts 99. For an instance of a patent ambiguity arising out of contradiction see *Saunderson v Piper* (1839) 5 Bing NC 425, where in a bill of exchange the amounts in words and in figures were different, though for a reason peculiar to that class of instrument the amount in words prevailed; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1422. For an instance of a patent ambiguity arising out of the writer's failure to make up his own mind see *Shep Touch* 250-251 (a grant 'to one of the children of J S'). For an instance of a patent ambiguity arising from omission to state the intention definitely see *Altham's Case* (1610) 8 Co Rep 150b at 155a (a limitation to two 'et heredibus'); *Pearce v Watts* (1875) LR 20 Eq 492 (reservation of the land 'necessary' for making a railway).

3 See *Bunge SA v Deutsche Conti-Handelsgesellschaft MBH (No 2)* [1980] 1 Lloyd's Rep 352 at 358 per Donaldson J.

4 However, a patent ambiguity 'allows evidence to be admitted to give effect to the intentions of the parties': *Rolfe Lubbell & Co v Keith* [1979] 2 Lloyd's Rep 75 at 77 per Kilner-Brown J; and see *Southwood v A-G* [1998] 40 LS Gaz R 37; and PARA 199 ante.

5 See PARA 185 ante.

6 See PARA 214 post.

7 *Matthews v Smallwood* [1910] 1 Ch 777, 785; *Trusthouse Forte Albany Hotels Ltd v Daejeon Investments Ltd (No 2)* [1989] 2 EGLR 113, CA; and see PARA 4 ante.

8 'All ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty': Bacon's Law Tracts 99-100. Where there is a doubt on the face of the instrument, the law admits no extrinsic evidence to explain it: *Saunderson v Piper* (1839) 5 Bing NC 425 at 431 per Tindal CJ. No averment de hors can make that good, which upon consideration of the deed is apparent to be void: *Altham's Case* (1610) 8 Co Rep 150b at 155a; and see *London Clearing Bankers Committee v IRC* [1896] 1 QB 222 at 227 per Wright J (affd [1896] 1 QB 542, CA).

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## 209. Latent ambiguity.

When the instrument appears on its face to be free from ambiguity but, upon the endeavour being made to apply it to the persons or things indicated, it appears that the words are equally applicable to two or more persons, or to two or more things, either without any inaccuracy or with a common inaccuracy which may be ignored as a slip, there is a latent ambiguity<sup>1</sup>. The ambiguity, in this case also called an equivocation<sup>2</sup>, is not discovered until the instrument comes to be applied to external circumstances. Direct evidence of the author's intention may be then given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted<sup>3</sup>, and where there is a jury the question of which of two or more possible meanings was intended is a question of fact for the jury<sup>4</sup>.

1 That is to say, an ambiguity in the terms of the instrument, the existence of which is first shown by extrinsic evidence, whether written or verbal, admissible in any event for the purpose of identifying the persons and things referred to in the instrument (see footnote to *Hitchin v Groom* (1848) 5 CB 515), unless the error is so obvious on the face of the document that the court can remedy it as a mere matter of construction: see *Wilson v Wilson* (1854) 5 HL Cas 40 at 66. See also *Charter v Charter* (1874) LR 7 HL 364; and PARA 208 note 2 ante.

2 *Doe d Hiscocks v Hiscocks* (1839) 5 M & W 363 at 369; *Douglas v Fellows* (1853) Kay 114 at 120.

3 *Altham's Case* (1610) 8 Co Rep 150b at 155a; *Shore v Wilson* (1842) 9 Cl & Fin 355 at 512-513, 517, HL, per Erskine J, and at 557 per Parke B; *Smith v Jeffryes* (1846) 15 M & W 561 at 562; *Hitchin v Groom* (1848) 5 CB 515 at 520; *Lord Waterpark v Fennell* (1859) 7 HL Cas 650 at 685 per Lord Wensleydale; *Roden v London Small Arms Co* (1876) 46 LJQB 213; and cf *Beaumont v Field* (1818) 1 B & Ald 247. In *M'Adam v Scott* (1912) 50 Sc LR 264, oral evidence was admitted to explain doubtful receipts. As to the application of this principle to documents of particular kinds see BOUNDARIES vol 4(1) (2002 Reissue) PARA 929; CHARITIES vol 8 (2010) PARA 108; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1083 et seq; WILLS vol 50 (2005 Reissue) PARAS 483, 487, 504 et seq.

4 *Sweet v Lee* (1841) 3 Man & G 452; *Daintree v Hutchinson* (1842) 10 M & W 85 (evidence as to meaning of initial letters in contract); *Goldshede v Swan* (1847) 1 Exch 154 (evidence that advance was not a past one); *Smith v Thompson* (1849) 8 CB 44; *Robinson v Great Western Rly Co* (1865) 35 LJCP 123 (oral evidence admitted to show which of two stations of the same name was intended); *Macdonald v Longbottom* (1860) 1 E & E 977 at 987, Ex Ch (evidence as to subject matter of sale of goods); *Lyle v Richards* (1866) LR 1 HL 222 (evidence as to boundary line where map incorrectly drawn); *Hordern v Commercial Union Insurance Co* (1887) 56 LJPC 78 (latent ambiguity in policy of insurance); *The Curfew* [1891] P 131; *M'Adam v Scott* (1912) 50 Sc LR 264 (evidence to explain ambiguous receipts); *EW Savory Ltd v World of Golf Ltd* [1914] 2 Ch 566, CA (evidence to identify subject matter of receipt).

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## (4) CORRECTION OF ERRORS BY INTRINSIC EVIDENCE

### 210. Rejection of words etc.

Since an instrument is to be construed according to the intention of the parties as appearing from the whole of its contents, it follows that that intention must not be defeated by too strict an adherence to the actual words<sup>1</sup>, and any corrections may be made which a perusal of the document shows to be necessary. Thus wrong grammar<sup>2</sup> and spelling<sup>3</sup> may be corrected<sup>4</sup>; words that are merely meaningless<sup>5</sup>, or that are repugnant<sup>6</sup>, or that have obviously been inserted or left in by mistake<sup>7</sup>, or that are immaterial and surplusage<sup>8</sup>, and even whole provisions<sup>9</sup>, may be rejected; words may be supplied, though more sparingly, when it is clear from the instrument itself that they have been omitted by inadvertence<sup>10</sup>, and words and clauses may be transposed<sup>11</sup>. Words will only be supplied or transposed so as to give effect to the clear intentions of the parties; it must therefore be clear not only that a mistake of omission or transposition has been made but also what correction is required in order to carry out the intentions of the parties<sup>12</sup>. Abbreviations will be construed so as to give effect to the instrument<sup>13</sup>, and stops and parentheses may be inserted when they are missing<sup>14</sup>. The court will, from the general frame of a settlement, collect the intent contrary to the effect of a particular clause<sup>15</sup>, but effect should be given to every word which does not appear to have been left in by mistake<sup>16</sup>. Hence comes the rule that when the court can clearly collect from the language within the four corners of a deed, or other instrument in writing, the real intention of the parties, it is bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned<sup>17</sup>.

1 'Qui haeret in litera haeret in cortice' (this means literally 'he who sticks to the letter sticks in the bark'): *Shep Touch* 87; and see *Earl of Northumberland v Earl of Egremont* (1759) 1 Eden 435 at 446. See also the third rule reported to have been laid down by Staunford J in *Throckmerton v Tracy* (1555) 1 Plowd 145 at 160 'thirdly, that the words shall be construed according to the intent of the parties and not otherwise; and here he cited what Bracton, saith, carte non est nisi vestimentum donationis; and the intent directs gifts more than the words'). See also *Smith d Dormer v Packhurst* (1742) 3 Atk 135 at 136, HL, per Willes CJ ('such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor').

2 *Glen's Trustees v Lancashire and Yorkshire Accident Insurance Co* (1906) 8 F 915, Ct of Sess; *Wells v Wright* (1677) 2 Mod Rep 285. In respect of bonds see *Dobson v Keys* (1610) Cro Jac 261.

3 *Hubert v Long* (1621) Cro Jac 607; *Mauleverer v Hawxby* (1670) 2 Saund 78. In respect of bonds see *Sims v Urry* (1676) 2 Cas in Ch 225; *Dennis v Snape* (1687) Comb 60; *Cromwell v Grunsden* (1698) 2 Salk 462.

4 'Falsa grammatica non vitiat concessionem; falsa orthographia non vitiat chartam': *Shep Touch* 55, 87; and see *Earl of Shrewsbury's Case* (1610) 9 Co Rep 46b at 48a. False grammar includes a case where the writer has stated the reverse of what he obviously meant, as where a bond is conditioned to be void on failure to make the stipulated payment: *Vernon v Alsop* (1663) 1 Lev 77 ('the obligation shall not be of no effect, if by any means it may be made good'). See further *Mauleverer v Hawxby* (1670) 2 Saund 78 (where the concluding words of the condition, 'then the condition to be void', were rejected as surplusage); *Wells v Wright* (1678) 2 Mod Rep 285 (where the condition provided that, if default was made in performance thereof, the obligation should be void); *Anon* (undated), cited in 1 Doug KB at 384 (where the condition provided that the bond should be void if the obligor did not pay). As to bonds see also *Langdon v Goole* (1681) 3 Lev 21. A double negative does not make an affirmative if the contrary intention is clear: *Shep Touch* 87. Cases of erroneous spelling are numerous in the early reports: Norton on Deeds (2nd Edn) 103. Many of these are on Latin words, as in *Walter v Pigot* (1602) Cro Eliz 896, where 'septuagintis' was read 'septingentis' so as to make the penalty on a bond £750, the bond being for £500; and in *Matthew v Purchins* (1608) Cro Jac 203, where 'nobilis' was corrected to 'nobilis' (6s 8d).

5 *Goodman v Knight* (1614) Cro Jac 358; *Langdon v Goole* (1681) 3 Lev 21 at 22; *Smith d Dormer v Packhurst* (1742) 3 Atk 135 at 136 (the court 'may reject any words that are merely insensible'); *Wilson v Wilson* (1854) 5 HL Cas 40; *Hanbury v Tyrell* (1856) 21 Beav 322 at 327; *Nicolene Ltd v Simmonds* [1953] 1 QB 543 at 551, [1953] 1 All ER 822 at 826, CA, per Denning LJ.

6 *Wilson v Wilson* (1847) 15 Sim 487 (on appeal (1854) 5 HL Cas 40); *Holmes v Ivy* (1678) 2 Show 15, where in a condition to a bond for 'the delivery of 35,000 tiles to the value of £144 at 15s 6d a thousand', the '35,000' (which should have been 185,000) was rejected; cf *Gwyn v Neath Canal Co* (1868) LR 3 Exch 209; and see PARA 212 note 4 post. As to rejecting words repugnant to words of limitation see PARA 244 post.

7 Eg where a contract is contained in a printed form from which the parties have omitted to strike out words applicable to a larger or different contract: *Dudgeon v Pembroke* (1877) 2 App Cas 284, HL; and see *Butler v Wigge* (1667) 1 Saund 65. See also *Finbow v Air Ministry* [1963] 2 All ER 647, [1963] 1 WLR 697 (where, the enactment under which a licence was stated to be approved having then been repealed and re-enacted, the approval was nevertheless held effective); *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305, [1969] 2 All ER 988, CA (where, on an application for planning permission to develop an undeveloped area coloured on an accompanying plan, outline planning permission was granted for development of the undeveloped area uncoloured on the plan).

8 *Waugh v Bussell* (1814) 5 Taunt 707 at 71.

9 *Glynn v Margetson & Co* [1893] AC 351 at 357, HL, per Lord Halsbury LC. See also *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, [1959] 3 All ER 182, PC; *Jones Construction Co v Alliance Assurance Co Ltd* [1961] 1 Lloyd's Rep 121 at 130, CA, per Danckwerts LJ.

10 The court, it has been said, has no power 'to alter the words or to insert words which are not in the deed': *Smith d Dormer v Packhurst* (1742) 3 Atk 135 at 136 per Willes CJ. This, however, goes too far. There are numerous instances where words accidentally omitted have been supplied. 'The law will, as much as it can, assist the frailties and infirmities of men in their employments, who, in drawing long deeds, may easily make a slip': *Lord Say and Seal's Case* (1711) 10 Mod Rep 40 at 47. Thus the name of the grantor has been inserted in the granting part of the deed (*Lord Say and Seal's Case* supra; *Trethewy v Ellesdon* (1690) 2 Vent 141 at 142); although where there were grantors of separate properties, the insertion of the name of the wrong grantor of one property was held not to be curable by construction (*Mill v Hill* (1852) 3 HL Cas 828 at 847-850). The omission of the name of the grantee in the premises has been supplied from the habendum: *Butler v Dodton* (1579) Cary 86; cf *Bustard v Coulter* (1602); Cro Eliz 902 at 917-918; and see *Spyve v Topham* (1802) 3 East 115 (where the trustee's name was substituted in the premises for the name of the cestui que trust, which had been erroneously inserted there); *Wilson v Wilson* (1854) 5 HL Cas 40 (separation agreement by which wife's trustees by mistake agreed to indemnify husband against his own debts instead of debts of wife). The name of the obligee of a bond may be supplied from the context (*Langdon v Goole* (1681) 3 Lev 21, where it was supplied by reference to the recital); and in *Coles v Hulme* (1828) 8 B & C 568, the sum of '7700' in the penalty of a bond was read '£7,700' by reference to the condition. The word 'assigns' may sometimes be supplied, but this will not be done where the result would be to enable the grantors to derogate from their own grant: *Anglo-Newfoundland Development Co v Newfoundland Pine and Pulp Co* (1913) 83 LJP 50. 'In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties': *Coles v Hulme* supra per Lord Tenterden CJ. The supplying of necessary words is an instance of the maxim that it is better for a thing to have effect than to be made void ('ut res magis valeat quam pereat'): *Langston v Langston* (1834) 2 Cl & Fin 194 at 243, HL. However, it can only be done where clearly required to avoid an absurdity, repugnancy, or inconsistency: *Clements v Henry* (1859) 10 I Ch R 79 (where the court refused to insert 'hereinbefore'); *You & Me Fashions Ltd v Royal Insurance Co Ltd* (1983) 133 NLJ 472.

Other instances of supplying words are: 'life' supplied in the memorial of an annuity (*Flight v Lord Lake* (1835) 2 Bing NC 72); 'hereinbefore declared' read as 'hereinbefore recited to have been declared' (*Hanbury v Tyrell* (1856) 21 Beav 322 at 326); 'pounds' inserted in a bill of exchange (*Phipps v Tanner* (1833) 5 C & P 488) and in a bill of sale (*Mourmand v Le Clair* [1903] 2 KB 216); in a bond securing an annuity for support of illegitimate children and their mother during their joint lives, the words 'and during the life of the survivor' added (*James v Tallent* (1822) 5 B & Ald 889); 'one pound' read as 'one hundred pounds' in a bond (*Waugh v Bussell* (1814) 5 Taunt 707); 'shall have attained the age of 21 years of' supplied in settlement (*Re Hargraves' Trusts, Leach v Leach* [1937] 2 All ER 545); 'without issue' supplied in marriage articles so as to make a gift over take effect only on death without issue and so save the interests of children (*Targus v Puget* (1751) 2 Ves Sen 194; *Kentish v Newman* (1713) 1 P Wms 234); all children who 'being sons' should attain 21 read as 'being sons or daughters' (*Re v Daniel's Settlement Trust* (1875) 1 ChD 375, CA; and see *Wight v Dicksons* (1813) 1 Dow 141, HL; and compare, as to a will, *Greenwood v Greenwood* (1877) 5 ChD 954, CA). The court will not, however, supply a word so as to alter the legal effect of limitations as expressed: see *Re Ethel and Mitchells and Butlers' Contract* [1901] 1 Ch 945, where the court refused to read 'in fee' as 'in fee simple'. As to supplying words inadvertently omitted in wills see *Re Follett, Barclays Bank Ltd v Dovel* [1955] 2 All ER 22, [1955] 1 WLR 429, CA; *Re Cory, Cory v More* [1955] 2 All ER 630, [1955] 1 WLR 725; *Re Whitrick, Sutcliffe v Sutcliffe* [1957] 2 All ER 467, [1957] 1 WLR 884, CA; *Re Riley's Will Trusts, Riley v Riley* [1962] 1 All ER 513, [1962] 1 WLR 344; *Re*

*Hammersley Foster v Hammersley*[1965] Ch 481, [1964] 2 All ER 24; and WILLS vol 50 (2005 Reissue) PARAS 544-545.

11 Words shall be transposed and marshalled so as the feoffment or grant may take effect: Co Litt 217b. In *Uvedale v Halfpenny* (1723) 2 P Wms 151, a portion term in a marriage settlement was transposed so as to take precedence of the limitations in tail; and in *Fenton v Fenton* (1837) 1 Dr & Wal 66, a power to make provision for 'such' to refer to both sons and daughters. As to transposing words in wills see *Re Bacharach's Will Trusts, Minden v Bacharach*[1959] Ch 245, [1958] 3 All ER 618; and WILLS vol 50 (2005 Reissue) PARAS 544-545.

12 *Schnieder v Mills*[1993] 3 All ER 377, [1993] STC 430. As to wills, cf *Re Follett, Barclays Bank Ltd v Dovell*[1955] 2 All ER 22, [1955] 1 WLR 429, CA; *Re Bacharach's Will Trusts, Minden v Bacharach*[1959] Ch 245, [1958] 3 All ER 618; and see WILLS vol 50 (2005 Reissue) PARAS 544-545.

13 'Ille numerus et sensus abbreviationum accipiendus est ut concessio non sit inanis': thus "'tot" ill' maner' in an old deed might be read in the singular or plural, according to the context: *Earl of Shrewsbury's Case* (1610) 9 Co Rep 46b at 48a.

14 *Doe d Willis v Martin* (1790) 4 Term Rep 39 at 65-66.

15 *Earl of Northumberland v Earl of Egremont* (1759) 1 Eden 435 at 446 per Henley, Lord Keeper; *Arundell v Arundell* (1833) 1 My & K 316. A term given absolutely has been held to be determinable on death without express words to that effect: *Coryton v Helyar* (1745) 2 Cox Eq Cas 340.

16 *Shelley's Case, Wolf v Shelley* (1581) 1 Co Rep 93b; *Butler v Duncomb* (1718) 1 P Wms 448 at 457 per Parker LC; *Hayne v Cummings* (1864) 16 CBNS 421 at 427; *Doe d Spencer v Godwin* (1815) 4 M & S 265; *Hitchin v Groom* (1848) 5 CB 515; *Tielens v Hooper*(1850) 5 Exch 830.

17 *Gwyn v Neath Canal Co*(1868) LR 3 Exch 209 at 215 per Kelly CB; *Baumont v Marquis of Salisbury* (1854) 19 Beav 198 at 206 per Romilly MR.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(4) CORRECTION OF ERRORS BY INTRINSIC EVIDENCE/211. Difference between words and figures, writing and printing.

### **211. Difference between words and figures, writing and printing.**

In the case of a difference between written words and figures, the written words as a general rule prevail, and in such a case evidence is not admissible to show that there was an omission from the written words<sup>1</sup>.

Where an instrument is in a printed form with written additions or alterations, the written words (subject always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, in case of reasonable doubt as to the meaning of the whole, to have a greater effect attributed to them than the printed words, because the written words are taken as being intended to qualify the printed form, and because they are the terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects<sup>2</sup>.

<sup>1</sup> *Saunderson v Piper* (1839) 5 Bing NC 425; *Durham City Estates Ltd v Felicetti* [1990] 1 EGLR 143, [1990] 03 EG 71, CA. However, in *Re Hammond, Hammond v Treharne* [1938] 3 All ER 308 (where there was a legacy of 'the sum of one hundred pounds (£500)'), Simonds J regarded the rule that the words prevail as a rule confined to commercial documents, and applied the rule of last resort of resolving repugnancies in wills, namely that the later in order prevail over the earlier, hence holding that the legacy was one of £500; and see further WILLS vol 50 (2005 Reissue) PARA 523. As to discrepancies between the words and figures in a bill of exchange or promissory note see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1422.

<sup>2</sup> *Robertson v French* (1803) 4 East 130 at 136 per Lord Ellenborough CJ; *Gumm v Tyrie* (1865) 6 B & S 298, Ex Ch; *Joyce v Realm Insurance Co* (1872) LR 7 QB 580 at 583; *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376 at 388; *Re L Sutro & Co and Heilbut, Symons & Co* [1917] 2 KB 348 at 358, 361, 367, CA; *Hadjipateras v S Weigall & Co* (1918) 34 TLR 360. See *Glynn v Margetson & Co* [1893] AC 351 at 354, 358, HL; *Addis v Burrows* [1948] 1 KB 444 at 449, 457, [1948] 1 All ER 177 at 178, 183, CA, per Evershed LJ; *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362 at 365, [1957] 1 WLR 356 at 360, CA, per Denning LJ; *The Brabant* [1967] 1 QB 588, [1966] 1 All ER 961; *Riley (Inspector of Taxes) v Cogan* [1968] 1 All ER 314, [1967] 1 WLR 1300; but see also *Jessel v Bath* (1867) LR 2 Exch 267. As to whether words deleted in a printed form of mercantile contract may still be used to construe words retained or added see PARA 175 note 13 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(4) CORRECTION OF ERRORS BY INTRINSIC EVIDENCE/212. Repugnant clauses.

## 212. Repugnant clauses.

If there are two clauses or parts of a deed repugnant to each other the first will be received and the latter rejected, unless there is some special reason to the contrary<sup>1</sup>. This is an expedient to which the court very reluctantly has recourse, and never until it has exhausted every other means in its power to reconcile apparent inconsistencies<sup>2</sup>. The rule is subordinate to the general principle that the intention must be ascertained from the entire contents of the deed<sup>3</sup>. Hence, when one clause is in accordance with, and the other is opposed to, the real intention, the former must be received and the latter rejected whatever their relative position<sup>4</sup>.

1 'The general rule is that, if there be a repugnancy, the first words in a deed, and the last words in a will shall prevail': *Doe d Leicester v Biggs* (1809) 2 Taunt 109 at 113 per Lord Mansfield CJ; and see *Bateson v Gosling* (1871) LR 7 CP 9 at 12 per Willes J; *Shep Touch* 88; *Cole v Sury* (1627) Lat 264; *Cother v Merrick* (1657) Hard 89 at 94 per Nicholas B; *Re Webber's Settlement* (1850) 17 Sim 221 at 222; *Bush v Watkins* (1851) 14 Beav 425 at 432; *Forbes v Git* [1922] 1 AC 256 at 259, PC. In *Seaman's Case* (1610) Godb 166, a lease was made habendum, after an existing term, for 23 years, to be accounted from the date of these presents; the latter words were rejected, and the 23 years ran from the end of the existing term. In *Cope v Cope* (1846) 15 Sim 118, in the phrase '£1,000 sterling lawful money of Ireland', the words 'of Ireland' were rejected. See *Martin v Martin* (1987) 54 P & CR 238 ('beneficial joint tenants in common in equal shares'), distinguishing *Joyce v Barker Bros (Builders) Ltd* (1980) 40 P & CR 512 on similar words.

2 *Bush v Watkins* (1851) 14 Beav 425. As to the similar application to a will of the converse rule see *Re Gare, Filmer v Carter* [1952] Ch 80 at 83, [1951] 2 All ER 863 at 864 per Harman J. See generally WILLS.

3 See PARA 175 ante.

4 'There is no doubt that . . . effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected': *Walker v Giles* (1848) 6 CB 662 at 702 per Willes CJ; and see *Parkhurst v Smith d Dormer* (1742) Willes 327 at 332. As to wills cf *Re Bywater, Bywater v Clarke* (1881) 18 ChD 17 at 24, CA. See also *Solly v Forbes* (1820) 2 Brod & Bing 38. Therefore a proviso in a bill of exchange drawn by a joint stock company purporting to restrict its liability is void, as being repugnant to the nature of a bill of exchange: *Re State Fire Insurance Co, ex p Meredith's and Conner's Claim* (1863) 32 LJ Ch 300. Similarly, in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL, effect was given to a typed clause attached to a charterparty notwithstanding that it purported to relate only to a bill of lading.



Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(4) CORRECTION OF ERRORS BY INTRINSIC EVIDENCE/213. Repugnant provisos.

### **213. Repugnant provisos.**

A covenant which, taken by itself, is clearly a personal covenant cannot be qualified by a proviso excluding personal liability; such a proviso is repugnant and must be rejected<sup>1</sup>. A proviso which is at first sight repugnant to the principal clause may, however, be reconciled with it by varying the effect of that clause. Thus a release to one of two partners, with a proviso that the release is not to prejudice the claims of the releasor against the other partner, operates not as a release, in which case the proviso would be repugnant, but as a covenant not to sue<sup>2</sup>.

1 *Furnivall v Coombes* (1843) 5 Man & G 736 at 751-752; *Watling v Lewis* [1911] 1 Ch 414; *Forbes v Git* [1922] 1 AC 256 at 259, PC; and see *Mildmay's Case* (1584) 1 Co Rep 175a; *Cheshire Lines Committee v Lewis & Co* (1880) 50 LJQB 121, CA; *Re Holloway's Trusts*, *Greenwell Ryan* (1909) 26 TLR 62; *Re Tewkesbury Gas Co*, *Tysoe v Tewkesbury Gas Co* [1911] 2 Ch 279 at 285 (affd [1912] 1 Ch 1, CA). As to a proviso postponing the immediate operation of a surrender of copyholds cf *Seagood v Hone* (1633) Cro Car 366. But a proviso merely limiting the personal liability under the covenant, without destroying it, is good: *Williams v Hathaway* (1877) 6 ChD 544 at 549.

2 *Solly v Forbes* (1820) 2 Brod & Bing 38; cf *Bateson v Gosling* (1871) LR 7 CP 9 (where there was a deed of arrangement releasing the debtor, with a proviso reserving the rights of creditors against securities); *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, [1956] 3 All ER 957, HL (printed clause in bill of lading relating to strikes held to qualify initial unqualified agreement to deliver goods at London or Hull so as to permit delivery at Hamburg).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(5) WHEN AN INSTRUMENT IS VOID FOR UNCERTAINTY/214. Uncertainty removable by election.

## **(5) WHEN AN INSTRUMENT IS VOID FOR UNCERTAINTY**

### **214. Uncertainty removable by election.**

An uncertainty upon a written instrument which remains after all methods of interpretation have been exhausted may sometimes be removed by the election of one of the parties; as where there is a grant of one of certain definite things<sup>1</sup>, or of land defined in amount, but indefinite in position<sup>2</sup>; or where a grant of a definite thing may operate in either of two ways<sup>3</sup>. In the former case, however, there must be a certainty in the nature or amount of the gift, and an uncertainty only in the specific gift; if the gift is such as to be reducible to certainty, not by mere election, but by assessment or other means for which no provision is made, the uncertainty cannot be removed<sup>4</sup>. There is no right of election against the Crown<sup>5</sup>.

1 'If I give you one of my horses, although that be uncertain, yet by your election that may be a good gift': *Mervyn v Lyds* (1553) 1 Dyer 90a at 91a; and see *Shep Touch* 251; Vin Abr, Grants (H 5); Bac Abr, Grants (H) 3; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523 at 538, CA.

2 Eg 'the moiety of a yard-land' in a certain waste (*Hungerford's Case* (1585) 1 Leon 30); or a lease of a farm containing 437 acres 'except 33 acres thereof' (*Jenkins v Green* (1858) 27 Beav 437).

3 *Heyward's Case* (1595) 2 Co Rep 35a at 35b (instrument operating either as a demise or a bargain and sale).

4 Eg a sale of all the tree 'that can be spared' (*Mervyn v Lyds* (1553) 1 Dyer 90a); or a reservation of 'the necessary land for making a railway' (*Pearce v Watts* (1875) LR 20 Eq 492). 'If I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it, then it is good': *Mervyn v Lyds* (1553) 1 Dyer 90a. See also *South Easter Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12 at 19, CA; *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505.

5 *Hungerford's Case* (1585) 1 Leon 30; *Brand v Todd* (1618) Noy 29. Any reference in the grant which enables the thing granted to be ascertained with certainty will be sufficient to validate the grant: *Doe d Devine v Wilson* (1855) 10 Moo PCC 502 at 525.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(5) WHEN AN INSTRUMENT IS VOID FOR UNCERTAINTY/215. Who is to elect and when.

## 215. Who is to elect and when.

Where an uncertainty is curable by election, the election lies with the party who has to do the first act towards completion of the grant<sup>1</sup>. Thus where the grant has been actually made, though in an uncertain form, the grantee can complete it by taking one of the various things offered him<sup>2</sup>, or by otherwise selecting the particular gift within the specified limits<sup>3</sup>.

Where the plaintiff agreed to lend the defendant £50 for 'nine or six months', the borrower, being required to do the act in respect of which the alternative periods were specified (that is, to repay the money), was held entitled to the option of either period<sup>4</sup>. If a lease is granted simply 'to hold for 7, 14, or 21 years' the tenant has the option of deciding after which period the lease is to determine, on the principle that a grant is construed most strongly in favour of the grantee<sup>5</sup>; but where a lease was determinable at a certain date 'if the parties shall so think fit', this was construed as 'if both parties shall think fit' and the joint assent of lessor and lessee was held to be necessary<sup>6</sup> for, if the matter lies only in agreement, then the grantor can fulfil his agreement in accordance with his own election<sup>7</sup>; and where a promise is in the alternative, and one branch of the alternative cannot be performed, the promisor is bound as a general rule to perform the other<sup>8</sup>.

Where a party issued an instrument in such ambiguous terms that it might be treated either as a bill of exchange or a promissory note, the holder was allowed to elect, as against the maker, to treat it as either<sup>9</sup>.

If no interest passes until the election, the election must be made in the lifetime of the parties, as where A gives to B one of his horses. The certainty begins, and the property passes, when the election is made by B taking a particular horse; and this must be in the lifetime of the donor and donee. If an interest passes, however, and the only doubt is as to the title by which it is to be taken, then the continued life of the parties is not necessary<sup>10</sup>.

1 'He who is the first agent, and ought to do the first act, shall have the election': *Heyward's Case* (1595) 2 Co Rep 35a at 36a, 37a; Co Litt 145a.

2 *Mervyn v Lyds* (1553) 1 Dyer 90a at 91a; Shep Touch 251. 'If A says to B, 'I grant you a horse out of my stable', he puts it in the power of B to take which horse he shall think proper'; *Dann v Spurrier* (1803) 3 Bos & P 399 at 403. See also *Reed v Kilburn Co-operative Society* (1875) LR 10 QB 264.

3 Eg where there is a grant of a specified amount of land in a defined larger area (*Hungerford's Case* (1585) 1 Leon 30), or a reservation in similar form (*Jenkins v Green* (1858) 27 Beav 437), or a grant of land of specified annual value (*Calthrop's Case* (1574) Moore KB 101 at 102). In *Lee's Case* (1578) 1 Leon 268, which appears to be contra, the alienation was perhaps not complete.

4 *Reed v Kilburn Co-operative Society* (1875) LR 10 QB 264. See also *Chippendale v Thurston* (1829) 4 C & P 98 (where the lender was required to do the act, ie give notice, and therefore was entitled to the option); *Layton v Pearce* (1778) 1 Doug KB 15; *Tilling Ltd v James* (1906) 94 LT 823; *Stewart & Co Ltd v Rendall* (1899) 1 F 1002, Ct of Sess; *Christie v Wilson* 1915 SC 645, Ct of Sess (where a landlord agreed to supplement the water supply so as to make it adequate, or otherwise to lay a pipe from a well and supply a pump, it was held that the option lay with the landlord and not with the tenant).

5 *Dann v Spurrier* (1803) 3 Bos & P 399; *Doe d Webb v Dixon* (1807) 9 East 15; *Price v Dyer* (1810) 17 Ves 356 at 363; *Powell v Smith* (1872) LR 14 Eq 85. Similarly, where goods are bought at six or nine months' credit the purchaser has the option: *Price v Nixon* (1814) 5 Taunt 338; *Deverill v Burnell* (1873) LR 8 CP 475 at 480. See, however, *Ashforth v Redford* (1873) LR 9 CP 20, where 'from six to eight weeks' was held to be used in a special mercantile sense.

6 *Fowell v Tranter* (1864) 3 H & C 458.

7 Under an agreement to grant a lease of a farm of 437 acres, reserving 37 acres, the selection is to be made by the person granting the lease (*Jenkins v Green* (1858) 27 Beav 437); if a condition be, that the obligor shall enfeoff a man of estate D or S upon request, the obligor has his election of which of the two he shall enfeoff him (1 Roll Abr, Condition (Y), pl 3, p 446; *Dann v Spurrier* (1803) 3 Bos & P 399 at 403).

8 *Stevens v Webb* (1835) 7 C & P 60; *McIlquham v Taylor* [1895] 1 Ch 53, CA; *Barkworth v Young* (1856) 4 Drew 1; *Wigley v Blackwal* (1600) Cro Eliz 780; *Anderson v Commercial Union Assurance Co* (1885) 55 LJQB 146, CA. A promisor who has elected to perform one alternative is not as a general rule excused from performance of the other by reason that performance according to his election has become impossible: *Brown v Royal Insurance Co* (1859) 1 E & E 853.

9 *Edis v Bury* (1827) 6 B & C 433. Where a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient of the communication puts upon it a meaning not intended by the sender: *Miles v Haslehurst & Co* (1906) 23 TLR 142 at 143 per Channell J. If the vendor uses expressions reasonably capable of misconstruction, or if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself: *Seaton v Mapp* (1846) 2 Coll 556 at 562 per Knight-Bruce V-C.

10 See *Heyward's Case* (1595) 2 Co Rep 35a; *Savill Bros Ltd v Bethell* [1902] 2 Ch 523 at 539, CA (where the things are several, nothing passes before election, and the election ought to be precedent; but when one and the same thing shall pass, there it passeth presently, and the election of the title may be subsequent). If the election related to a particular piece of land which was to be granted or reserved, and the conveyance was to operate at common law and not under the Statute of Uses (1535) (now repealed), the effect of the conveyance and subsequent election was to create a future freehold, and hence the conveyance was void: *Bullock v Burdett* (1568) 3 Dyer 281a; *Savill Bros Ltd v Bethell* supra at 540.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(5) WHEN AN INSTRUMENT IS VOID FOR UNCERTAINTY/216. Deed void if finally unintelligible or doubtful.

## **216. Deed void if finally unintelligible or doubtful.**

If after every effort has been made to construe the deed by intrinsic evidence, with the assistance of such extrinsic evidence as is admissible under the rules (including, in the case of a latent ambiguity, direct evidence of intention)<sup>1</sup>, the deed is unintelligible<sup>2</sup>, or there remains an uncertainty which is not removable by election, either the whole deed or the particular clause, as the case may require, will be held void for uncertainty<sup>3</sup>. This is only done with reluctance<sup>4</sup>; and in cases of ambiguity it is a settled canon of construction that a construction which will make the clause valid is to be preferred to one which will make it void<sup>5</sup>.

1 See PARAS 185-209 ante.

2 Thus where a lessor of minerals reserves to himself rights of working the non-demised minerals by a clause to which no definite meaning can be given, the clause will be rejected: *Mundy v Duke of Rutland* (1883) 23 ChD 81, CA.

3 *Mervyn v Lyds* (1553) 1 Dyer 90a (a patent ambiguity not curable by election); *Lord Cheyney's Case* (1591) 5 Co Rep 68a (a latent ambiguity, where there was no direct evidence of intention to determine it); and see Bacon's Law Tracts 99-100; Shep Touch 250-251. An uncertainty as to the commencement of a lease cannot be cured by election: *Anon* (1674) 1 Mod Rep 180; but see *Anon* (1591) 1 Leon 227. See also *Savill Bros Ltd v Bethell* [1902] 2 Ch 523, CA; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA.

4 'The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty': *Doe d Winter v Perratt* (1843) 6 Man & G 314 at 362, HL, per Lord Brougham (on a will).

5 *Mills v Dunham* [1891] 1 Ch 576 at 590, CA, per Kay LJ. See also PARA 177 ante. For the principle that the court will not allow an agreement to fail on the ground of uncertainty if to do so would amount to sanctioning a fraud see *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 847.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(6) RECITALS/(i) Variance between Recitals and Operative Part of Instrument/217. Effect of recitals on construction.

## **(6) RECITALS**

### **(i) Variance between Recitals and Operative Part of Instrument**

#### **217. Effect of recitals on construction.**

In the construction of an instrument the recitals are subordinate to the operative part, and consequently, where the operative part is clear, it is treated as expressing the intention of the parties, and prevails over any suggestion of a contrary intention afforded by the recitals<sup>1</sup>. It has sometimes been suggested that a perfectly clear recital may control the operative part<sup>2</sup>; but where the court cannot effect the intention of the parties by giving the operative words a meaning which they will fairly bear, the proper remedy is, it seems, to rectify the deed<sup>3</sup>. Where, however, the operative part is doubtful, the recitals can be used to explain its meaning<sup>4</sup>; and while, for the purpose of construing the operative part, the whole of the instrument may be referred to, the recitals leading up to it are more likely to furnish the key to its true construction than the subsidiary clauses of the deed<sup>5</sup>. Recourse may be had to a recital to determine between two possible meanings of the operative part, although one of the meanings is the more obvious, and would be preferred if no light could be derived from the rest of the deed<sup>6</sup>. A recital may be used to affirm a result which the deed would naturally produce, and which is not expressed in the operative part<sup>7</sup>.

A misrecital of an interest which is referred to in the operative part will not affect the construction if the intention is clear. Thus the grant of a reversion upon a lease is good, notwithstanding an error in the recital of the lease<sup>8</sup>. An error in the recital of a lease may, however, be important where it occurs in the grant of a new lease intended to take effect on the determination of the former lease<sup>9</sup>. If the misrecital is such that the new lease purports to take effect on the determination of a lease which is in fact non-existent, the new lease will commence at once, even though it thereby runs out before an existing lease<sup>10</sup>, though, if possible, the new lease will be read so as to avoid this result<sup>11</sup>.

A recital will only estop that party whose statement, according to the construction of the instrument, it is<sup>12</sup>.

The need for a full recital of an earlier instrument in a later one can be avoided by expressing that the later instrument is supplemental to the earlier. The later instrument will then be read and have effect as if it contained a full recital of the earlier instrument<sup>13</sup>.

1 *Bailey v Lloyd* (1829) 5 Russ 330 at 344 per Leach MR; and see *Walsh v Trevanion* (1850) 15 QB 733 at 751 per Patteson J; *Young v Smith* (1865) 35 Beav 87 at 90 per Romilly MR; *Re Moon, ex p Dawes* (1886) 17 QBD 275 at 286, CA, per Lord Esher MR; *Orr v Mitchell* [1893] AC 238 at 254, HL, per Lord Macnaghten. See also *Alexander v Crosbie* (1835) L & G temp Sugd 145; *Holliday v Overton* (1852) 14 Beav 467 at 470 (affd (1852) 16 Jur 751); *Leggott v Barrett* (1880) 15 ChD 306 at 311, CA, per Brett LJ; *Dawes v Tredwell* (1881) 18 ChD 354 at 358, CA, per Jessel MR; *Re Sassoon, IRC v Ezra* [1933] Ch 858 at 879, CA (affd sub nom *IRC v Ezra* [1935] AC 96, HL). See further PARA 218 post.

2 *Boyd v Petrie* (1872) 7 Ch App 385 at 392; *Australian Joint Stock Bank v Bailey* [1899] AC 396 at 400, PC.

3 *Young v Smith* (1865) 35 Beav 87 at 90; *Gwyn v Neath Canal Co* (1868) LR 3 Exch 209. In *Barratt v Wyatt* (1862) 30 Beav 442, Romilly MR seems to have intimated that the court might, in the case of obvious failure of the operative part to carry out a specific recital, read the deed as amended in accordance with the recital. See, however, the principle enunciated by the same judge in *Young v Smith* supra.

4 See *Re Michell's Trusts* (1878) 9 ChD 5 at 9, CA, per Jessel MR ('We may consider it settled by authority, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning'). See also *Earl Mountague v Earl of Bath* (1693) 3 Cas in Ch 55 at 101; *Crouch v Crouch* [1912] 1 KB 378 (covenant in operative part to pay indefinitely controlled by recital that payment was to be for a specified period). See further PARA 219 post. As to guarantees see eg *Lord Arlington v Merricke* (1672) 2 Saund 403, 411; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1086.

5 *Orr v Mitchell* [1893] AC 238 at 254, HL, per Lord Macnaghten.

6 *Orr v Mitchell* [1893] AC 238, HL. See also *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 99-101 (affd (1821) 4 Bli 1, HL); *Gwyn v Neath Canal Co* (1868) LR 3 Exch 209 at 219 per Channell B; *Re Coghlan, Broughton v Broughton* [1894] 3 Ch 76 at 84.

7 Eg in a mortgage deed the liability to pay interest: *Ashwell v Staunton* (1861) 30 Beav 52.

8 *Withes v Casson* (1615) Hob 128 at 129; cf *Moody v Lewen* (1593) Cro Eliz 127 (where a grant following a misrecital of a fine was adjudged good, 'for there is sufficient certainty of the thing granted, and of the intention of the parties to grant it').

9 Co Litt 46b; *Bishop of Bath's Case* (1605) 6 Co Rep 34b, 36a; *Miller v Manwaring* (1635) Cro Car 397.

10 *Foote v Berkly* (1670) 1 Lev 234.

11 See *Skinner v Gray* (1595) note to *Mount v Hodgkin* (1554) 2 Dyer 116a; *Foote v Berkly* (1670) 1 Lev 234. A lease cannot be granted so as to take effect more than 21 years from the date of the instrument purporting to create it: see the Law of Property Act 1925 s 149(3); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 106; REAL PROPERTY vol 39(2) (Reissue) PARA 102.

The decision that a misrecital of a sum due under a lease (eg a rent of £170 instead of £140) in a collateral bond for payment of the sum cannot be corrected by reference to the lease itself (*Lainson v Tremere* (1834) 1 Ad & El 792) was disapproved in *Greer v Kettle* [1938] AC 156 at 166, 169, 172, [1937] 4 All ER 396 at 400, 402, 404, HL. As to a misrecital of title see *Moseley v Motteux* (1842) 10 M & W 533; and as to erroneous recital of a draft will in an instrument purporting to carry out the intention of the draft see *Re Carter's Trusts* (1869) 3 IR Eq 495.

12 See *Greer v Kettle* [1938] AC 156 at 170, [1937] 4 All ER 396 at 403, HL; and see further ESTOPPEL vol 16(2) (Reissue) PARAS 1014, 1020 et seq.

13 See the Law of Property Act 1925 s 58; and SALE OF LAND vol 42 (Reissue) PARA 284.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(6) RECITALS/(i) Variance between Recitals and Operative Part of Instrument/218. Operative part not controlled by recitals.

## **218. Operative part not controlled by recitals.**

Recitals have been held not to control the operative part of an instrument, for example where a bond recites the penalty as a sum smaller than the penal sum actually mentioned<sup>1</sup>. Parcels in a deed described with certainty are not cut down by recitals showing that something less was intended to pass<sup>2</sup>, nor are they extended by recitals that more was to pass<sup>3</sup>. A covenant in a marriage settlement on the part of both spouses to settle after-acquired property of the wife will bind the wife, although according to the recitals it is the husband only who is to covenant<sup>4</sup>. On the other hand, a covenant by the husband only will not be extended by the recital of an agreement for settlement of after-acquired property so as to be a covenant by the wife also<sup>5</sup>.

1 *Ingleby v Swift* (1833) 10 Bing 84 (where the sum in the recital was £500 and in the operative part £1,000; the debt due at the time of action exceeded £500, and the question was whether the liability of the sureties could be restricted by the recital); *Sansom v Bell* (1809) 2 Camp 39; cf *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC; and see *Evans v Earle* (1854) 10 Exch 1. Recitals in a bond may, however, restrict the onerousness of the condition: see PARA 220 post.

2 Where, in a marriage settlement, there was a recital of the settlor's intention to settle all his estate except the lands of 'B' and its sub-denominations, and there was in the operative part a specific conveyance of 'K', one of the sub-denominations of 'B', it was held that 'K' passed (*Alexander v Crosbie* (1835) L & G temp Sugd 145); cf *Re Gowen and Shanks, ex p Young* (1839) 4 Deac 185 (recitals relating to joint property of partners did not control operative part which extended to separate property); *Re Medley, ex p Glyn* (1840) 1 Mont D & De G 29 (recitals relating to freeholds subject to a charge did not prevent operative part affecting freeholds not so subject and copyholds). See also *Re Owen's Trust* (1855) 1 Jur NS 1069 (interests included in operative part of settlement, but not in recitals); *Youde v Jones* (1845) 14 Sim 131.

3 *Macnamara v Carey* (1866) IR 1 Eq 9 (recital in settlement of agreement to settle five distinct denominations of land; two were omitted from operative part; these did not pass).

4 *Willoughby v Middleton* (1862) 2 John & H 344. So an absolute covenant not to do an act will not be qualified by a recital of an intention that it may be done on payment (see *Bird v Lake* (1863) 1 Hem & M 111); and an absolute covenant for title will be enforced even as regards a defect appearing in a recital (*Page v Midland Rly Co* [1894] 1 Ch 11, CA); though a doubtful covenant may be explained by a recital (*Re Coghlan, Broughton* [1894] 3 Ch 76, where a covenant by a wife to settle property acquired during her life was restricted to property acquired during coverture). A recital as to the settlor's intention will not control clear words in the operative part, although they fail to carry out that intention: *Re Sassoon, IRC v Ezra* [1933] Ch 858 at 879; affd sub nom *IRC v Ezra* [1935] AC 96, HL.

5 *Hammond v Hammond* (1854) 19 Beav 29; *Young v Smith* (1865) 35 Beav 87; *Re Webb's Trusts* (1877) 46 LJ Ch 769; *Dawes v Tredwell* (1881) 18 ChD 354, CA. If the husband, however, covenants that he and his wife shall settle, and she executes the deed, the recital will justify the deed being read as containing a covenant by the wife: *Re De Ros' Trust, Hardwicke v Wilmot* (1885) 31 ChD 81.



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## **219. Recital explaining operative part.**

The following are instances where the recitals assist the construction of the operative part of an instrument: where there is an ambiguity in the operative part as to the property affected<sup>1</sup>; where the operative part contains general words, and the recital shows that only specific property, comprised in the general words, was intended to pass<sup>2</sup>; and where the recital shows that a limitation in point of time must be placed on the operative part<sup>3</sup>. After a recital that the assignor is entitled to a specific share of property under a will or settlement, an assignment of that specific share 'or other the part or share, parts or shares' to which he is entitled will, if the rest of the instrument supports the recital, be restricted to the specific share<sup>4</sup>. An apparent inaccuracy in a covenant may be corrected by restricting it in the manner indicated by a recital<sup>5</sup>; and the omission in the operative part of reference to a person who executes the deed may be supplied from a recital<sup>6</sup>.

1 *Walsh v Trevanion* (1850) 15 QB 733.

2 Although words of specific description are not easily dealt with, yet general words are; and though general words may be in themselves large enough, yet if, upon the whole scope of the instrument, as to which special regard is to be had to what are called introductory recitals, it appears it was not the intention of the parties to pass these properties, it will not pass them: *Howard v Earl of Shrewsbury* (1874) LR 17 Eq 378 at 391 per Jessel MR. See also *Moore v Magrath* (1774) 1 Cowp 9; *Doe d Meyrick v Meyrick* (1832) 2 Cr & J 223; *Rooke v Lord Kensington* (1856) 2 K & J 753; *Hopkinson v Lusk* (1864) 34 Beav 215; *Neame v Moorsom* (1866) LR 3 Eq 91 at 97 per Lord Romilly MR; *Jenner v Jenner* (1866) LR 1 Eq 361; *Re Earl of Durham, Earl Grey v Earl of Durham* (1887) 57 LT 164; *Orr v Mitchell* [1893] AC 238, HL. As to the interests comprised in a disentailing deed see *Grattan v Langdale* (1883) 11 LR Ir 473.

3 *Lord Arlington v Merricke* (1672) 2 Saund 411 (fidelity bond restricted to the original six months of office as appearing from a recital); *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507 (similar case). As to recitals assisting the construction of covenants for title see *Barton v Fitzgerald* (1812) 15 East 530 at 541.

4 *Gray v Earl of Limerick* (1848) 2 De G & Sm 370; *Childers v Eardley* (1860) 28 Beav 648.

5 *Re Neal's Trusts* (1857) 4 Jur NS 6; *Crouch v Crouch* [1912] 1 KB 378. Apparently a recital has more effect in controlling the language of a covenant than of a grant: see *McLurcan v Lane* (1858) 7 WR 135.

6 *Dent v Clayton* (1864) 33 LJ Ch 503 (recital that wife, who executed the deed, joined to release dower, but the wife not mentioned in operative part as releasing).

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(6) RECITALS/(i) Variance between Recitals and Operative Part of Instrument/220. Condition of a bond controlled by recitals or indorsement.

## **220. Condition of a bond controlled by recitals or indorsement.**

Recitals may operate in restraint of the condition of a bond<sup>1</sup> where the words of the condition import a larger liability than that contemplated by the recitals<sup>2</sup>, especially in favour of sureties<sup>3</sup>. Where, however, the condition is for repayment of money to be advanced, the amount being limited by the recitals to a certain sum, an advance in excess of such sum does not avoid the bond in the absence of an express stipulation to that effect. The effect is merely to limit the liability of the obligor to the sum mentioned in the recitals<sup>4</sup>.

The condition will not be controlled or limited by recitals which are not clearly consistent with that condition<sup>5</sup>, nor will recitals affect the obligatory part of a bond if that part is clear and unambiguous; recitals are not considered to form part of the obligation, but to be incorporated with and form part of the condition<sup>6</sup>.

The condition may be restrained by a memorandum indorsed on the bond, if it appears to have been the intention of the parties that the memorandum should form part of the condition and it was indorsed on the bond before execution<sup>7</sup>.

1 For the meanings of 'condition' and 'obligation' of a bond see PARA 91 ante.

2 *Pearsall v Summersett* (1812) 4 Taunt 593; *Payler v Homersham* (1815) 4 M & S 423; *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507.

3 *Lord Arlington v Merricke* (1672) 2 Saund 411; *African Co v Mason* (1714) cited 1 Str 227.

4 *Parker v Wise* (1817) 6 M & S 239; *Gordon v Rae* (1858) 8 E & B 1065 at 1086-1087.

5 *Bird v Lake* (1863) 1 Hem & M 111; *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC.

6 *Ingleby v Swift* (1833) 10 Bing 84; *Sansom v Bell* (1809) 2 Camp 39. See further PARA 218 note 1 ante.

7 *Broke v Smith* (1602) Moore KB 679; *Burgh v Preston* (1800) 8 Term Rep 483; *Hurst v Jennings* (1826) 5 B & C 650; *Reed v Norris* (1837) 2 My & Cr 361.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(6) RECITALS/(i) Variance between Recitals and Operative Part of Instrument/221. Releases and powers of attorney.

## 221. Releases and powers of attorney.

Releases are especially liable to have general words in the operative part of an instrument controlled by the recitals. The general words in a release are limited always to those things which were specially in the contemplation of the parties at the time when the release was given<sup>1</sup>; and since it is the office of recitals to state the particular considerations upon which a deed is founded, they naturally control the operation of the release<sup>2</sup>. Thus, if in a release of debts there are recitals as to the specific debts to be released, the release will operate only as to these debts<sup>3</sup>; and a release to an administrator, founded on a recital of specified assets having been got in, will not extend to other assets<sup>4</sup>. Similarly, a power of attorney is liable to be restricted by the recitals<sup>5</sup>. In a power of attorney, reciting the principal's intended absence abroad and his desire to appoint attorneys to act during his absence, the operative part, though unlimited, was held to be confined to the principal's absence<sup>6</sup>.

This rule has been applied to indemnities and guarantees<sup>7</sup>.

1 *Directors of London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610 at 623 per Lord Westbury; *Lyall v Edwards* (1861) 6 H & N 337; *Re Joint Stock Trust and Finance Corp Ltd* (1912) 56 Sol Jo 272; *Richmond v Savill* [1926] 2 KB 530, CA; *Bank of Credit and Commerce International SA (in liquidation) v Ali* [1999] 2 All ER 1005. See also *Skilbeck v Hilton* (1866) LR 2 Eq 587.

2 If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties and intended to be released: *Ramsden v Hylton* (1751) 2 Ves Sen 304 at 310 per Lord Hardwicke LC. See also *Lampon v Corke* (1822) 5 B & Ald 606 at 611 per Best J; *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182 at 190, CA, per Lindley MR; *Thorpe v Thorpe* (1701) 1 Ld Raym 235, 662. So concurrence in a conveyance to obviate a specified objection as to title binds the concurring party only as regards that objection; contra, if he concurs to obviate objections generally: *Lord Braybroke v Inskip* (1803) 8 Ves 417; *Marquis of Cholmondeley v Lord Clinton* (1817) 2 Mer 171, 355. Similarly, a deed of compromise of ascertained specific questions does not extend to rights not then in dispute: *Cloutte v Storey* [1911] 1 Ch 18, CA.

3 *Payler v Homersham* (1815) 4 M & S 423. The same principle applies as to causes of action: *Simons v Johnson* (1832) 3 B & Ad 175. In the absence of such recitals, however, the general words will have effect: see *Lampon v Corke* (1822) 5 B & Ald 606 at 611.

4 *Anon* (1862) 31 Beav 310. See also *Lindo v Lindo* (1839) 1 Beav 496; *Turner v Turner* (1880) 14 ChD 829 (assets got in by the administrator after release not included in release); *Major v Salisbury* (1845) 14 LJB 118.

5 A general power of attorney conferring the widest authority may be granted by use of the form prescribed by the Powers of Attorney Act 1971 (see Sch 1) or a form to the like effect but expressed to be made under the Act: s 10(1). The statutory form contains no recitals. See further AGENCY vol 1 (2008) PARA 57 et seq.

6 *Danby v Coutts & Co* (1885) 29 ChD 500.

7 As to indemnities see *Boyes v Bluck* (1853) 13 CB 652. As to guarantees see *Pearsall v Summersett* (1812) 4 Taunt 593; *Bain v Cooper* (1842) 9 M & W 701; but see *Sansom v Bell* (1809) 2 Camp 39.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(6) RECITALS/(ii) Effect of Recital as a Covenant/222. Recital constituting covenant.

## (ii) Effect of Recital as a Covenant

### 222. Recital constituting covenant.

No technical language is needed to make a covenant, and any words in a deed which show an intention that the parties or one of them is to be bound to do or not to do a thing will constitute a covenant<sup>1</sup>. Such an intention may appear from a recital, and then, in the absence of any contrary indication in the deed, the recital will operate as a covenant<sup>2</sup>. This will be so where the recital is that one party has agreed to do or not to do a certain thing, as to pull down a mill and build a larger one<sup>3</sup>; to settle property<sup>4</sup>; to pay a composition on his own debts<sup>5</sup>, or to pay the debts of another<sup>6</sup>; not to enforce a debt until the security for it has been realised<sup>7</sup>; in a separation deed, that the husband and wife have agreed to live apart<sup>8</sup>; that one party is to have a certain share of profits<sup>9</sup>; or where the recital is that a certain thing is intended to be done<sup>10</sup>. A recital or acknowledgement that a certain sum of money is due may be construed as a covenant to pay it<sup>11</sup>. For a recital to amount to a covenant, however, it must be plain upon the whole deed that it was so intended<sup>12</sup>. The court will be cautious in spelling a covenant out of a recital in a deed, because that is not the part of the deed in which covenants are usually expressed<sup>13</sup>.

1 See PARA 249 post.

2 *Aspdin v Austin*(1844) 5 QB 671 at 683 per Lord Denman CJ; and see *Severn and Clerk's Case* (1588) 1 Leon 122. As to the effect of recitals as estoppels see ESTOPPEL; and as to the effect of a recital as an execution of a power see POWERS.

3 *Sampson v Easterby* (1829) 9 B & C 505; affd sub nom *Easterby v Sampson* (1830) 6 Bing 644, Ex Ch (here the construction was assisted by an express covenant to keep the new mill in repair).

4 *Buckland v Buckland*[1900] 2 Ch 534 at 540; and see *Graves v White* (1680) Freem Ch 57; *Duckett v Gordon* (1860) 11 I Ch R 181 (where, in a marriage settlement, it was recited that the wife's father desired to settle property).

5 *Lay v Mottram* (1865) 19 CBNS 479; *Brooks v Jennings*(1866) LR 1 CP 476.

6 *Saltoun v Houstoun* (1824) 1 Bing 433; *Carr v Roberts* (1833) 5 B & Ad 78.

7 *Farrall v Hilditch* (1859) 5 CBNS 840.

8 *Re Weston, Davies v Tagart*[1900] 2 Ch 164.

9 See *Barfoot v Freswell and Picard* (1675) 3 Keb 465 (where an indenture recited an agreement that the plaintiff should have one-third part of coals dug in a mine and it was said by Hale CJ, 'Were it but a recital, that before the indenture they were agreed, it is a covenant').

10 *Hollis v Carr* (1676) 2 Mod Rep 86.

11 *Brice v Carre and Emerson* (1661) 1 Lev 47; *Saunders v Milsome*(1866) LR 2 Eq 573; *Isaacson v Harwood*(1868) 3 Ch App 225; *Jackson v North Eastern Rly Co*(1877) 7 ChD 573 at 583; cf *Cheslyn v Dalby* (1840) 4 Y & C Ex 238.

12 *Borrowes v Borrowes* (1872) 6 IR Eq 368.

13 *Farrall v Hilditch* (1859) 5 CBNS 840 at 854.



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### **223. Recital introduced for other purpose.**

A recital will not operate as a covenant if it appears on the whole instrument to have been introduced for some other purpose. Thus where a recital that a debt is due is introductory to a charge for the debt given by the operative part, it will not amount to a covenant so as to make the debt a specialty debt<sup>1</sup>. In accordance with the rules that the operative part prevails over the recitals<sup>2</sup>, and that expressed terms exclude implied terms<sup>3</sup>, a recital will not create a covenant where the operative part contains an express covenant dealing with the same subject matter<sup>4</sup>.

1 *Courtney v Taylor* (1843) 6 Man & G 851 at 868; *Ivens v Elwes* (1854) 3 Drew 25; *Stone v Van Heythusen* (1854) Kay 721; *Marryat v Marryat* (1860) 28 Beav 224 at 226; *Isaacson v Harwood* (1868) 3 Ch App 225 at 228; *Jackson v North Eastern Rly Co* (1877) 7 ChD 573. It seems that a recital of a debt will readily be assumed to be for some other purpose than to create a covenant, for it is easy to insert a covenant for payment if this is intended: *Courtney v Taylor* (1843) 6 Man & G 851. A recital that consideration money has been paid, when in fact it has not been paid, does not imply a covenant to pay it: *Morgan's Patent Anchor Co v Morgan* (1876) 35 LT 811.

2 See PARAS 217-218 ante.

3 See PARA 182 ante.

4 *Dawes v Tredwell* (1881) 18 ChD 354, CA; cf *Young v Smith* (1865) LR 1 Eq 180.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(7) RECEIPT CLAUSES/224. Conclusiveness of receipt.

## (7) RECEIPT CLAUSES

### 224. Conclusiveness of receipt.

A receipt for money though contained in a deed, is not conclusive that the money has been in fact paid and evidence can be given of the non-payment of the whole or part of it<sup>1</sup>. Where, however, a purchaser in good faith for valuable consideration<sup>2</sup> derives title under a deed executed after 31 December 1881 containing in its body, or having indorsed upon it, a receipt for consideration money or other consideration, and that person has no notice that the consideration was not in fact paid or given, either wholly or in part, then in his favour the receipt is sufficient evidence of the payment or giving of the whole amount of the receipt<sup>3</sup>.

1 *Burchell v Thompson*[1920] 2 KB 80 at 86, DC, per Lush J; and see *Greer v Kettle*[1938] AC 156 at 171, [1937] 4 All ER 396 at 404, HL, per Lord Maugham. A receipt in a deed (provided that it was not merely indorsed on the deed and under hand: see *Lampon v Corke* (1822) 5 B & Ald 606 at 612) formerly operated at law to estop the person who had given it from saying that the money had not been paid (*Baker v Dewey* (1823) 1 B & C 704 at 707; and see *Rowntree v Jacob* (1809) 2 Taunt 141 at 143); but this was not so in equity (*Hawkins v Gardiner* (1854) 2 Sm & G 441; *Wilson v Keating* (1859) 27 Beav 121 at 126; and see *Coppin v Coppin* (1725) 2 P Wms 291 at 295; *Gresley v Mousley* (1862) 3 De GF & J 433). At law, also, the fact of non-payment might in some cases be proved, as where a cheque was dishonoured (*Deverell v Whitmarsh* (1841) 5 Jur 963), but not where the receipt was founded on a miscalculation (*Harding v Ambler* (1838) 3 M & W 279). The receipt was not an estoppel where it was not an absolute acknowledgment of payment, but referred to and was qualified by a recital of an agreement to pay (*Bottrell v Summers* (1828) 2 Y & J 407; *Lampon v Corke* supra); and since the Supreme Court of Judicature Act 1873 (see now the Supreme Court Act 1981 (prospectively renamed the Senior Courts Act 1981) s 49(1); and EQUITY vol 16(2) (Reissue) PARAS 401, 496 et seq), the rule in equity has prevailed. It follows that the unpaid purchase money will be secured by the usual vendor's lien: *Winter v Lord Anson* (1827) 3 Russ 488. The fact that a mortgage contains a recital of an amount as due for costs does not preclude a party to the mortgage from taking out a summons for delivery of a bill of costs, or for taxation of a bill that has been delivered: *Re Foster, Barnato v Foster*[1920] 3 KB 306, CA (disapproving *Re Forsyth* (1865) 34 Beav 140; *Re Gold* (1871) 24 LT 9). An acknowledgement of receipt of premium in a marine insurance policy effected by a broker is conclusive between insurer and assured, but not between insurer and broker: see the Marine Insurance Act 1906 s 54; and INSURANCE vol 25 (Reissue) PARA 90.

2 That expression is used to include a lessee, mortgagee or other person who for valuable consideration acquires an interest in property and, in reference to a legal estate, includes a chargee by way of legal mortgage: see the Law of Property Act 1925 s 205(1)(xxi) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 7). As to the position of a transferee of a mortgage see generally MORTGAGE.

3 Law of Property Act 1925 s 68; and see *Rice v Rice* (1854) 2 Drew 73 at 83; *Bickerton v Walker*(1885) 31 ChD 151, CA; *Lloyds Bank Ltd v Bullock*[1896] 2 Ch 192; *Rimmer v Webster*[1902] 2 Ch 163 at 173-174, where Farwell J distinguished *Carritt v Real and Personal Advance Co*(1889) 42 ChD 263, and said that *Rice v Rice* supra was a case of pure estoppel; *Bateman v Hunt*[1904] 2 KB 530, CA; *Powell v Browne* (1907) 97 LT 854, CA; *Capell v Winter*[1907] 2 Ch 376 at 381, where, however, Parker J observed at 382 that *Rice v Rice* supra and *Lloyds Bank Ltd v Bullock* supra did not really depend on estoppel; *De Lisle v Union Bank of Scotland*[1914] 1 Ch 22, CA; *Re King's Settlement, King v King*[1931] 2 Ch 294; *Tsang Chuen v Li Po Kwei*[1932] AC 715, PC. Although the transaction is between a solicitor and his client, a subsequent purchaser who has knowledge of the fact is not, it seems, normally thereby put upon inquiry: see eg *Powell v Browne* (1907) 97 LT 854, CA. See further, as to receipts SALE OF LAND.

## UPDATE

### 224 Conclusiveness of receipt

NOTE 1--Supreme Court Act 1981 cited as Senior Courts Act 1981 as from 1 October 2009: SI 2009/1604.





Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(7) RECEIPT CLAUSES/225. Receipt clause as authority for solicitor to receive money.

**225. Receipt clause as authority for solicitor to receive money.**

Where the solicitor<sup>1</sup> for the vendor or for the mortgagor produces a deed having in its body or indorsed thereon a receipt executed or signed by the vendor or mortgagor and in reliance on the statutory authority in that behalf<sup>2</sup> the consideration money is paid to the solicitor, the vendor or the mortgagor is estopped from denying the authority of the solicitor to receive it<sup>3</sup>.

1 The reference to a solicitor includes a licensed conveyancer under the Administration of Justice Act 1985 ss 11(2), 34 (as amended) (see LEGAL PROFESSIONS vol 66 (2009) PARAS 1319 et seq, 1411): s 34(1) (amended by the Land Registration Act 2002 s 135, Sch 13).

2 See the Law of Property Act 1925 s 69; and SALE OF LAND vol 42 (Reissue) PARA 315; LEGAL PROFESSIONS vol 66 (2009) PARA 787.

3 *King v Smith* [1900] 2 Ch 425.

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## **(8) THE PROPERTY CONVEYED**

### **(i) The Parcels: Inaccurate Descriptions**

#### **226. Description of property.**

The property comprised in a deed, or the 'parcels', is described by terms having either a general or specific meaning, and usually by two or more such terms. Where possible, full effect will be given to all the terms of description. Thus a grant of all the grantor's freehold land in the county of Hampshire contains a general and also a specific term, and effect is given to both by treating the specific term as restricting the general term. Consequently, of all the grantor's freehold land, only that situate in the county of Hampshire will pass<sup>1</sup>. In such a case both the descriptions are required in order to define the particular property which is being dealt with. It is always a question of fact whether a particular parcel of land is or is not contained in the description of the land conveyed<sup>2</sup>.

It may be, however, that, of the various terms used, some are sufficient to define the property with certainty, and the rest add a description which is not true; for example, if there is a grant of a specified house, with words sufficient to ascertain it with certainty, and then there is added 'now in the occupation of A', when the house is in fact in the occupation of B. In this case the additional words cannot be treated as words restricting the previous description. They are simply untrue: they are an inaccurate additional description<sup>3</sup>. Since, however, the rest of the description defines the property intended to be disposed of and the deed must, if possible, be supported, the error is not allowed to prejudice the grant and the erroneous addition is rejected<sup>4</sup>.

1 See *Miller v Travers* (1832) 8 Bing 244 (a case of a devise).

2 In order to find the true meaning of any relevant document reference may be made to the recitals: *Doe d White v Osborne* (1840) 4 Jur 941; and see PARA 219 ante. Evidence outside the deed is admissible to identify the particular lands denoted by the words of the deed (*Dublin and Kingstown Rly Co v Bradford* (1857) 7 ICLR 57, 624; *Lyle v Richards* (1866) LR 1 HL 222 at 239) but not so as to contradict plain language of description in the deed (*Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA; *Woolfs v Powling* [1999] All ER (D) 125, (1999) Times, 9 March, CA). Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found, and to the circumstances in which they are used (*Lord v Sydney City Comrs* (1859) 12 Moo PCC 473 at 497) and, where the instrument is an ancient instrument and, probably, even where it is a modern instrument, they may be explained by subsequent possession (*Booth v Ratté* (1890) 15 App Cas 188 at 192, PC; *L Schüler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772 [1975] 1 WLR 468, CA; and see PARAS 205-206 ante). The express mention of certain property, eg 'quarries', may show that other property, such as 'mines', was not intended to pass, on the principle 'expressio unius est exclusio alterius' (see PARAS 182-183 ante), especially where assisted by the recitals: *Denison v Holliday* (1857) 1 H & N 631 at 648-649; affd (1858) 3 H & N 670. See *Francis v Hayward* (1882) 22 ChD 177, CA (fascia passing as part of a house); *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA (cellar under house passing as part of house although only current access from neighbouring house); *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, HL (hedge and ditch presumption applied). See also BOUNDARIES vol 4(1) (2002 Reissue) PARA 927 et seq.

3 'The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only': *Morrell v Fisher* (1849) 4 Exch 591 at 604 per Alderson B. See also *Cowen v Truefitt Ltd* [1899] 2 Ch 309 at 311, CA, per Lindley MR, quoting from Jarman on Wills (5th Edn) 742 (see now 2 Jarman on Wills (8th Edn) 1246-1247); but see PARA 228 post.

4 See BOUNDARIES vol 4(1) (2002 Reissue) PARA 928; and cf *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL.

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## 227. Effect of false description.

That an erroneous description will be rejected is expressed by the rule 'falsa demonstratio non nocet cum de corpore constat'<sup>1</sup>; but this rule is subject to another rule, namely that in general the additional words are not rejected as importing a false description, if they can be read as words of restriction<sup>2</sup>. These two rules govern the construction of parcels. When the premises are sufficiently described, as by giving the particular name of a close or otherwise, an erroneous additional description will be rejected as a 'falsa demonstratio'<sup>3</sup>; but if there is not this certainty in the first description (for example, if it is expressed in general terms) and a particular description is added, the latter controls the former and limits the generality of the earlier description<sup>4</sup>, for where words are inserted which thus form an essential part of the description of the subject matter they cannot be rejected<sup>5</sup>. In case of doubt whether words are a 'falsa demonstratio' or words of restriction they must be taken as words of restriction, for the law will not assume that the description is erroneous or false<sup>6</sup>. Of course the additional words may be neither words of restriction nor of false description, but simply an alternative description which exactly fits the premises already described<sup>7</sup>. Here the further description is redundant.

<sup>1</sup> I.e. a false description does not vitiate when there is no doubt as to who is the person meant. See *Travers v Blundell* (1877) 6 ChD 436 at 442, 444, CA.

<sup>2</sup> I.e. 'non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram': *Morrell v Fisher* (1849) 4 Exch 591 at 604. But see PARA 228 post.

<sup>3</sup> *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Barton v Dawes* (1850) 19 LJCP 302; *Cowen v Truefitt Ltd* [1899] 2 Ch 309, CA; *Watcham v A-G of East Africa Protectorate* [1919] AC 533, PC. Many cases of 'falsa demonstratio' have reference to the construction of wills: see WILLS vol 50 (2005 Reissue) PARA 561.

<sup>4</sup> *Doe d Smith v Galloway* (1833) 5 B & Ad 43 at 51 per Parke J; *Roe d Conolly v Vernon and Vyse* (1804) 5 East 51 (on a will); *Morrell v Fisher* (1849) 4 Exch 591 at 604 per Alderson B. See further PARA 231 post. Where there are several descriptions which, when evidence of surrounding facts is admitted, are not consistent with one another, there is no general rule by which the court can decide which description ought to prevail; but other things being equal it would seem that the more detailed and precise the description, the more likely it is to accord with the real intention of the parties; the order in which the conflicting descriptions occur is not at all conclusive: *Eastwood v Ashton* [1915] AC 900 at 912, HL, per Lord Parker.

<sup>5</sup> *Magee v Lavell* (1874) LR 9 CP 107; and see *Early v Rathbone* (1888) 57 LJ Ch 652.

<sup>6</sup> Bacon's Law Tracts 76; *Doe d Harris v Greathed* (1806) 8 East 91 at 104; *Morrell v Fisher* (1849) 4 Exch 591; and see *Doddington's Case*, *Hall v Peart* (1594) 2 Co Rep 32b at 33a, n(A).

<sup>7</sup> Eg 'No 73, Oxford Street, now in the occupation of John Smith', where such is the actual occupation.

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## 228. Descriptions rejected.

It follows from the rule 'falsa demonstratio non nocet cum de corpore constat'<sup>1</sup> that, where the particular land is ascertained with certainty by part of the description, an erroneous statement as to the mode in which title to the land is derived<sup>2</sup>, or as to tenure<sup>3</sup> or area<sup>4</sup>, or mode of user<sup>5</sup> or name<sup>6</sup> or parish<sup>7</sup> or boundary<sup>8</sup> or occupation<sup>9</sup>, will be rejected. The description which is rejected as false need not follow the true description. The whole description must be looked at fairly to see which are the leading words of description and which is the subordinate matter<sup>10</sup>.

The words of a positive covenant by a vendor in a deed conveying part of his property cannot be relied on to qualify the effect of a clear and unambiguous parcels clause identifying the part of the property that is being conveyed<sup>11</sup>.

1 See PARA 227 ante.

2 Eg 'All my manor of Sale in Dale which I had by descent'. If had by purchase and not by descent, yet the manor, being sufficiently described, passes; but contra if the first description is not specific, as 'all my lands in Dale which I had by descent': *Shep Touch* 247; *Wrotesley v Adams* (1559) 1 Plowd 187 at 191; *Windham v Windham* (1581) 3 Dyer 376b. The rest of the instrument may show that the words as to title are restrictive: *Clay and Barnet's Case* (1613) Godb 236.

3 Devise of 'my freehold farm and lands situate at Edgware, and now in the occupation of James Bray', held to pass a part of the farm which was copyhold: *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314.

4 Where a piece of land was described by reference to a plan drawn to scale, and was stated to contain 34 perches, whereas the plan showed it to contain 27 perches only, the description '34 perches' was rejected: *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Shep Touch* 247; *Lord Willoughby v Foster* (1553) 1 Dyer 80b; *Jack v McIntyre* (1845) 12 Cl & Fin 151, HL; *Manning v Fitzgerald* (1859) 29 LJ Ex 24. Where a farm sufficiently described was stated to contain 213 acres, certain woodlands, 56 acres in extent, part of the farm, but not included in the 213 acres, were held to pass: *Portman v Mill* (1839) 8 LJ Ch 161. Where premises are sold by name and what was intended to be included under the name cannot be determined on the face of the deed, the evidence of a contemporary survey, made by agreement between the vendor and purchaser for the purpose of determining the boundary between the land sold and land retained by the vendor, may prevail over statements as to the quantity of the land conveyed contained in the deed: *Barnard v De Charleroy* (1899) 81 LT 497, PC; cf *Jervy v Styling* (1874) 29 LT 847; and see BOUNDARIES vol 4(1) (2002 Reissue) PARAS 937 et seq. Where the dimensions are an essential part of the description and not a mere addition to a description which is in the first place sufficiently certain, they cannot be rejected: *Mellor v Walmesley* [1905] 2 Ch 164 at 175, CA, per Vaughan Williams LJ.

5 Where there was a devise of freehold hereditaments called West Cliff, situate at West Cowes, 'now used as lodging-houses', the whole of the West Cliff estate passed, though only part was used as lodging-houses: *Cunningham v Butler* (1861) 3 Giff 37.

6 *Rorke v Errington* (1859) 7 HL Cas 617 at 626.

7 *Lambe v Reaston* (1813) 5 Taunt 207; cf *Cotterel v Franklin* (1815) 6 Taunt 284; contra *Norris's Case and Campian's Case* (1570) 3 Dyer 292a.

8 *Francis v Hayward* (1882) 22 ChD 177 at 181, CA, per Jessel MR.

9 A demise by lessors of the reversion of all their 'farm in Brosley, in the tenure of Roger Wilcox', passed the farm though not in such tenure: *Wrotesley v Adams* (1559) 1 Plowd 187 at 191. See also *Swyft v Eyres* (1639) Cro Car 546; *Goodtitle d Radford v Southern* (1813) 1 M & S 299; *Wilkinson v Malin* (1832) 2 Cr & J 636; *Doe d Smith v Galloway* (1833) 5 B & Ad 43 (lease of land with in specified abutments 'now in the occupation of' S); and see *Hardwick v Hardwick* (1873) LR 16 Eq 168 (a devise), where both the situation and occupation were inaccurately described, but the estate, being clearly identified, passed. A reference to occupation will not

necessarily limit the premises conveyed, although it is true of only a part of the premises: *Martyr v Lawrence* (1864) 2 De GJ & Sm 261 at 270.

10 *Hardwick v Hardwick* (1873) LR 16 Eq 168 at 175 per Lord Selborne LC; *Re Bright-Smith, Bright-Smith v Bright-Smith* (1886) 31 ChD 314; *Cowen v Truefitt Ltd* [1899] 2 Ch 309, CA. Formerly the earlier words prevailed, and if they were false the grant was void: *Dowtie's Case* (1584) 3 Co Rep 9b; and see *Stukeley v Butler* (1614) Hob 168 at 171.

11 *Rhone v Stephens* (1993) 67 P & CR 9, CA; affd on appeal [1994] 2 AC 310, [1994] 2 All ER 65, HL.

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## 229. Plans.

Frequently when property is conveyed it is described both by words and by reference to a plan<sup>1</sup>, and this should be done when practicable so that the plan may be looked at for the purpose of explaining the language of the parcels<sup>2</sup>; but it is imprudent to rely upon a plan alone as the sole description, since slight errors in the drawing may have serious consequences<sup>3</sup>; moreover, a complete and unambiguous description in a deed will prevail over a plan<sup>4</sup>. A description which is sufficient without reference to a plan may be enough<sup>5</sup>, but the purchaser, at any rate in simple cases<sup>6</sup>, can insist on a plan in order to supplement the general description in the conveyance if the latter is not sufficiently precise. If, however, the description in the contract is sufficient to identify the property, the purchaser cannot require it to be supplemented by a plan at the expense of the vendor<sup>7</sup>. Attaching a plan to a conveyance does not necessarily warrant the accuracy of the plan<sup>8</sup>.

1 Where a plan is used, a substantive description of the property should be included in the body of the deed or in a schedule, so that the plan should merely assist the description. It is usual and proper to refer to the plan as being by way of identification, and not as operating to enlarge or restrict the verbal description. Where property is contracted to be bought by a plan, the plan determines the extent of property sold, notwithstanding that particulars subsequently given, purporting to be particulars of the property shown on the plan, are erroneous (*Gordon-Cumming v Houldsworth* [1910] AC 537, HL (a Scottish case)); if the plan shows the lengths of three sides of the plot but not the fourth, the fourth side may, in accordance with the plan, be taken to be a straight line although not readily compatible with the state of the land (see *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA). As to the admissibility of plans and maps generally see CIVIL PROCEDURE vol 11 (2009) PARAS 943, 954-955. See also BOUNDARIES vol 4(1) (2002 Reissue) PARA 939.

2 *Taylor v Parry* (1840) 1 Man & G 604 at 616; *Lyle v Richards* (1866) LR 1 HL 222 at 231; cf *Re Otway's Estate* (1862) 13 I Ch R 222 at 234. If a plan forms part of a conveyance, the fact that it is not referred to in the conveyance does not oblige the court to disregard it: *Leachman v L and K Richardson Ltd* [1969] 3 All ER 20 at 29-30, [1969] 1 WLR 1129 at 1141-1142, distinguishing *Wyse v Leahy* (1875) IR 9 CL 384. A plan on particulars of sale which are referred to in the deed can probably not be looked at: *Barlow v Rhodes* (1833) 1 Cr & M 439.

3 *Llewellyn v Earl of Jersey* (1843) 11 M & W 183; *Barton v Dawes* (1850) 10 CB 261; *Davis v Shepherd* (1866) 1 Ch App 410; *Thompson v Hickman* [1907] 1 Ch 550. See also 1 Dart's Vendors and Purchasers (8th Edn) 479; 1 Williams on Vendor and Purchaser (4th Edn) 653; 1 Davidson's Precedents in Conveyancing (5th Edn) 63-66.

4 *Dublin and Kingstown Rly Co v Bradford* (1857) 7 ICLR 57; *Roe v Lidwell* (1860) 11 ICLR 320, Ex Ch; *Horne v Struben* [1902] AC 454 at 458, PC. This will be so although the words of the deed are general, if sufficiently definite (*Willis v Watney* (1881) 51 LJ Ch 181); but not where the description in the deed is indefinite and requires the plan to explain it; the plan will then prevail (*Eastwood v Ashton* [1915] AC 900, HL; *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225; *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA). See also PARA 228 note 4 ante.

5 *Re Sparrow and James' Contract* (1902) [1910] 2 Ch 60; and see *Eastwood v Ashton* [1915] AC 900, HL (where the plan was required to supplement the verbal description).

6 Where the nature of the property does not render the preparation of a plan difficult: see *Re Sansom and Narbeth's Contract* [1910] 1 Ch 741 at 749-750.

7 *Re Sharman and Meade's Contract* [1936] Ch 755, [1936] 2 All ER 1547.

8 *Re Sparrow and James' Contract* (1902) [1910] 2 Ch 60. The representation of a road on a plan does not necessarily amount to an undertaking that the road will be made: *Heriot's Hospital Feoffees v Gibson* (1814) 2 Dow 301; *Squire v Campbell* (1836) 1 My & Cr 459; *Nurse v Lord Seymour* (1851) 13 Beav 254 at 269.





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### **230. Description in conveyance.**

The description of the parcels<sup>1</sup> in the conveyance should correspond with the description of the contract for sale<sup>2</sup>; but, if the language used in the contract does not describe the land with sufficient distinctness, the purchaser is entitled to frame a new description, either by means of a plan or otherwise, so that there can be no doubt as to the effect of the conveyance<sup>3</sup>. The purchaser can insist on an appropriate description of the property as at the date of the conveyance, and on the modern description being connected with the old description<sup>4</sup>.

1 As to the meanings of 'lands', 'tenements', and 'hereditaments' see REAL PROPERTY vol 39(2) (Reissue) PARA 74 et seq. 'Land', in the absence of restrictive expressions, means freehold land (*Hughes v Parker* (1841) 8 M & W 244; Sugden, Vendors and Purchasers (14th Edn) 298), and includes houses and everything permanently affixed. As to the respective rights of a landlord and tenant to trees see FORESTRY vol 52 (2009) PARAS 54-55; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 191 et seq. As to the premises included in a demise see generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 159 et seq. As to lands occupied with a house see *Kerford v Seacombe, Hoylake and Deeside Rly Co* (1888) 57 LJ Ch 270. As to the rights of the purchaser in respect of boundary walls see *Baird v Bell* [1898] AC 420, HL; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 962 et seq. For the principle that a conveyance of land passes mines and minerals unless they are expressly excepted or circumstances exist to rebut the presumption see eg *Harris v Ryding* (1839) 5 M & W 60 at 73; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 21. For the wider principle that, unless there is something to the contrary, a conveyance of land includes the surface and all that is supra (houses, trees and the like) and all that is infra (mines, earth, clay etc) see *Mitchell v Mosley* [1914] 1 Ch 438 at 450, CA; *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA (cellar under house). For the effect of exceptions in conveyances see PARAS 237-239 post. As to the soil of highways bounding the premises see PARA 232 post.

2 See *Monighetti v Wandsworth London Borough Council* (1908) 73 JP 91.

3 *Re Sansom and Narbeth's Contract* [1910] 1 Ch 741 at 747. As to discrepancy between a plan and detailed description see *Gordon-Cumming v Houldsworth* [1910] AC 537, HL; and PARA 229 note 1 ante.

4 *Re Sansom and Narbeth's Contract* [1910] 1 Ch 741 at 749. Where the description of the parcels appearing in the last abstracted deed is obsolete, it is generally advisable to frame a new description based on a recent survey, and for identification to incorporate and connect both descriptions in the conveyance.

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### 231. Restrictive words.

Where the principal words of the description lack the certainty which is necessary for the rejection of the subordinate description as a 'falsa demonstratio'<sup>1</sup>, and this subordinate description can be read as limiting the principal description, it will be construed accordingly<sup>2</sup>. This, for example, is done when the first part of the description is expressed in general terms, and the second part is suitable for defining a particular property included in the general terms<sup>3</sup>; and in such a case words describing the occupation of the premises will be construed as words of restriction<sup>4</sup>. However, even if the principal description is in specific form if it does not contain the requisite certainty, it will be restricted by a reference to the occupation<sup>5</sup>, or to the situation<sup>6</sup>. Where words of description in the body of a deed refer to a schedule as more particularly describing the property conveyed, the schedule will in general be construed as limiting the description in the deed, and only the premises mentioned in the schedule will pass<sup>7</sup>; but a thing mentioned in the schedule, to which there has been no reference in the body of the deed, will not pass<sup>8</sup>.

1 See PARA 227 ante.

2 See *Slingsby v Grainger* (1859) 7 HL Cas 273 at 283 per Lord Chelmsford LC.

3 In a Crown grant of lands in the city of Wells in the occupation of JB, the words 'in the city of Wells' were held to be restrictive, and lands elsewhere did not pass, although in the occupation of JB (*Doddington's Case, Hall v Peart* (1594) 2 Co Rep 32b at 33a); a devise of freehold estates in the county of Limerick and in the city of Limerick did not pass estates in the county of Clare (*Miller v Travers* (1832) 8 Bing 244; and see *Doe d Harris v Greathed* (1806) 8 East 91; *Evans v Angell* (1858) 26 Beav 202); but a specific enumeration does not necessarily cut down the effect of previous general words (*Stukeley v Butler* (1614) Hob 168).

4 *Doe d Parkin v Parkin* (1814) 5 Taunt 321 (on a will); *Bartlett v Wright* (1593) Cro Eliz 299 (on a deed); *Oguel's Case* (1587) 4 Co Rep 48b at 50a; *Homer v Homer* (1878) 8 ChD 758, CA (on a will).

5 *Morrell v Fisher* (1849) 4 Exch 591 (devise by a testator of all his leasehold farmhouse, homestead, lands and tenements, at Headington, containing about 170 acres, held under Magdalen College, Oxford, and now in the occupation of B, did not pass land at Headington held by the testator under the college, but not in the occupation of B). See also *Dyne v Nutley* (1853) 14 CB 122; *Magee v Lavell* (1874) LR 9 CP 107 (agreement); *Re Seal, Seal v Taylor* [1894] 1 Ch 316, CA (will).

6 *Webber v Stanley* (1864) 16 CBNS 698 (where a devise of lands referred to as the Tedworth estate, in Hants, was restricted to the part of the estate in that county, though another part was in Wiltshire). See also the principles of construction set out in *Webber v Stanley* supra at 752-753 per Erle CJ; *Pedley v Dodds* (1866) LR 2 Eq 819. As to premises being restricted by reference to a 'will' cf *Gibson v Clark* (1819) 1 Jac & W 159 at 163.

7 *Griffiths v Penson* (1863) 9 Jur NS 385; *Barton v Dawes* (1850) 10 CB 261. The Bills of Sale Act (1878) Amendment Act 1882 s 9 requires the description of the chattels comprised in a bill of sale to be relegated to the schedule: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1711. General words assigning things incident to articles specified in the schedule have their due effect: *Cort v Sager* (1858) 3 H & N 370.

8 *Re McManus, ex p Jardine* (1875) 10 Ch App 322.

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### **232. Land bounded by road or river.**

Where a conveyance of land describes the land as bounded by a public road or a river, the conveyance will be construed as passing half the road or half the bed of the river; that is, from the edge of the land to the middle of the road ('ad medium filum viae') or to the middle of the river ('ad medium filum aquae'), unless there is enough in the circumstances, or in the language of the instrument, to show that that is not the intention of the parties<sup>1</sup>.

<sup>1</sup> *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133 at 145, CA, per Cotton LJ; *Simpson v Dendy* (1860) 8 CBNS 433 at 472 (affd sub nom *Dendy v Simpson* (1861) 7 Jur NS 1058); *Berridge v Ward* (1861) 10 CBNS 400; *Crossley & Sons Ltd v Lightowler* (1866) LR 3 Eq 274 at 295 (affd with variations (1867) 2 Ch App 478). See also *Central London Rly Co v London City Land Tax Comrs* [1911] 2 Ch 467, CA; affd sub nom *London City Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL. The rule applies to a lease (*Haynes v King* [1893] 3 Ch 439 at 448) and to a Crown grant (*Lord v Sydney City Comrs* (1859) 12 Moo PCC 473), but not in the case of an inclosure award allotting waste lands of a manor bordering on a river, so as to give half the bed of the river with the plots allotted (*Ecroyd v Coulthard* [1897] 2 Ch 554 (affd [1898] 2 Ch 358, CA); cf *Hindson v Ashby* [1896] 2 Ch 1 at 6, 9, CA). The application of the principle of 'ad medium filum aquae' does not depend in any way on the nature and origin of the title of the grantor: *Maclaren v A-G for Quebec* [1914] AC 258 at 276, PC. There is a presumption that the soil of a stream belongs in moieties to the landowners on either side: see *Wishart v Wyllie* (1853) 1 Macq 389, HL. The presumption applies to a private road (*Holmes v Bellingham* (1859) 7 CBNS 329 at 336; *Smith v Howden* (1863) 14 CBNS 398), but apparently not to an inland lake (*Bloomfield v Johnston* (1868) IR 8 CL 68 at 89, 95, 97, Ex Ch). It is immaterial that there are wayside verges separating the highway or private right of way from the adjoining lands: *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572; on appeal [1975] 1 All ER 772, [1975] 1 WLR 468, CA (land on either side of accessway expressly included in parcels conveyed to purchaser; accessway also vested in purchaser; the maxim was not discussed in the Court of Appeal). See further on this subject BOUNDARIES vol 4(1) (2002 Reissue) PARAS 920, 924; HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 217; WATER AND WATERWAYS vol 100 (2009) PARA 74 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(8) THE PROPERTY CONVEYED/(ii) General Words of Description/233. Construction of general words.

## (ii) General Words of Description

### 233. Construction of general words.

Where, in the description of property comprised in a conveyance, general words follow an enumeration of specific things or classes of things, then prima facie the general words must be taken in their ordinary meaning, and will receive the extensive construction which that ordinary meaning requires. There may, however, be indications in the language of the instrument that the general words are to have a more limited meaning, and then they will be construed so as to include only things ejusdem generis<sup>1</sup> with those which have been specifically mentioned before<sup>2</sup>.

General words in a deed will be construed with reference to the recitals, and may be restrained by a particular recital<sup>3</sup>; general words will also be construed with reference to the subject matter in relation to which they are used and may be limited accordingly<sup>4</sup>; and the court in construing a written contract is entitled to consider the probability that the parties have used words in a sense given to them by well-known judicial construction<sup>5</sup>, or that they had certain extrinsic facts appearing from the surrounding circumstances of the particular case in their minds when they entered into the contract<sup>6</sup>.

Where a man assigns or charges all his property, the question may arise whether such an assignment or charge is unenforceable as being too vague or contrary to public policy in that no one should be allowed to deprive himself of his livelihood<sup>7</sup>.

<sup>1</sup> As to the ejusdem generis rule see PARA 234 post.

<sup>2</sup> *Anderson v Anderson*[1895] 1 QB 749 at 753, CA, per Lord Esher MR; *Hadjipateras v S Weigall & Co* (1918) 34 TLR 360; *Parker v Marchant* (1842) 1 Y & C Ch Cas 290 at 300 (on a will). In *Pope v Whitcombe* (1827) 3 Russ 124, a creditor's deed assigning furniture, stock-in-trade, debts, and securities for money, and 'all other the estate and effects' of the assignor, was held not to pass a contingent interest in a testatrix's residuary estate; and, similarly, in *Re Wright's Trusts* (1852) 15 Beav 367; but these decisions would not now be followed: *Ivison v Gassiot* (1853) 3 De GM & G 958. In the last case the specific exception of wearing apparel assisted the general words, and indicated that everything else was to pass; but, apart from this, there is nothing in particular words of this nature to indicate a specific genus and so cut down the general words; moreover, the object of such a deed is to pass everything of value: *Ringer v Cann* (1838) 3 M & W 343; *Doe d Farmer v Howe* (1840) 9 LJB 352. General words in a commercial document are, like general words in a deed such as a deed of settlement, prima facie to bear their natural and larger meaning and not to be restricted to things ejusdem generis previously enumerated, unless there is something in the document to show an intention so to restrict them: *Chandris v Isbrandtsen-Moller Co Inc*[1951] 1 KB 240 at 244, [1950] 1 All ER 768 at 771-772 per Devlin J. The recitals may show that general words are to be restricted: *Hopkinson v Lusk* (1864) 34 Beav 215; and see PARA 219 ante. As to the construction of powers of attorney so as to limit them to the specified objects see *Harper v Godsell*(1870) LR 5 QB 422; *Jacobs v Morris*[1902] 1 Ch 816, CA; and PARA 221 ante. For the principle that general words in an exception clause do not ordinarily except a party from liability for his own negligence see PARA 178 ante.

<sup>3</sup> *Payler v Homersham* (1815) 4 M & S 423; *Danby v Coutts & Co*(1885) 29 ChD 500. Thus where a bill of sale assigned 'all household goods of every kind and description whatsoever in a certain house more particularly mentioned and set forth in an inventory', and the inventory omitted some of the goods, it was held that the operative part of the bill of sale was restricted to the subsequent words: *Wood v Rowcliffe*(1851) 6 Exch 407. In the case of a policy of life assurance this principle extends to reading the policy and declaration together, so that where a policy provided that the policy should be void if any statement in the declaration was untrue, and the declaration declared that the policy should be void if any statement therein was designedly untrue, the declaration was held to explain the clause in the policy, which could accordingly only be avoided by reason of a designedly untrue statement: *Fowkes v Manchester and London Life Assurance and Loan Association* (1863) 3 B

& S 917; *Hemmings v Sceptre Life Association Ltd*[1905] 1 Ch 365. As to variations between recitals and operative parts of deeds see PARA 217 ante.

4 *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co*(1887) 12 App Cas 484 at 490, HL, per Lord Halsbury LC; *Gardner v Baillie* (1796) 6 Term Rep 591; *Hay v Goldsmidt* (1804), cited 1 Taunt 349; *Hogg v Snaith* (1808) 1 Taunt 347; *Perry v Holl* (1860) 2 De GF & J 38; *Harper v Godsell*(1870) LR 5 QB 422; *Lewis v Ramsdale* (1886) 55 LT 179; *Metropolitan Rly Co v Postmaster-General* (1916) 85 LJB 1541.

5 *Thames and Mersey Marine Insurance Co v Hamilton, Fraser & Co*(1887) 12 App Cas 484, HL.

6 *Birrell v Dryer*(1884) 9 App Cas 345 at 353, HL.

7 The question was discussed, but not decided, in the following cases: *Re Clarke, Coombe v Carter*(1887) 36 ChD 348, CA (assignment to mortgagee of after-acquired property); *Tailby v Official Receiver*(1888) 13 App Cas 523 at 530-531, HL (bill of sale assigning future book debts); *Re Turcan*(1888) 40 ChD 5, CA (covenant to settle after-acquired property); *Re Kelcey, Tyson v Kelcey*[1899] 2 Ch 530 (general charge on all property); *Syrett v Egerton*[1957] 3 All ER 331, [1957] 1 WLR 1130, DC (charge on all income and estate). In each of these cases it was sought to enforce such an assignment, covenant, charge or bill of sale against specific existing property. Since these transactions were divisible (see *Re Clarke* supra, *Re Turcan* supra) this was possible, and to the extent of the specific existing property they were unobjectionable, being neither vague nor contrary to public policy. See also PARA 273 post.

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### 234. Ejusdem generis rule.

Where the particular things named have some common characteristic which constitutes them a genus, and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions, then the rule of ejusdem generis will apply, and the general words will be restricted to things of the same nature as those which have been already mentioned<sup>1</sup>; but the absence of a common genus between the enumerated words will not necessarily prevent a restricted construction of the general words if justified by the context<sup>2</sup>. The ejusdem generis construction will be assisted if the general scope or language of the deed, or the particular clause, indicates that the general words should receive a limited construction<sup>3</sup> or if an unlimited construction will produce some unforeseen loss to the grantor<sup>4</sup>.

A common application of the ejusdem generis rule occurs in the construction of policies of insurance, where special enumerated risks are insured against, followed by a general clause insuring against all risks whatsoever, the last clause being construed as limited to risks of the same nature as those previously mentioned<sup>5</sup>.

1 *Moore v Magrath* (1774) 1 Cowp 9 at 12 per Lord Mansfield; *Lambourn v McLellan* [1903] 2 Ch 268, CA. Such cases have given rise to the common enunciation of the ejusdem generis rule as the rule to be prima facie applied 'where a particular class is spoken of, and general words follow': *Lyndon v Standbridge* (1857) 2 H & N 45 at 51 per Pollock CB; *Clifford v Arundell* (1860) 1 De GF & J 307 at 311 per Lord Campbell LC; *Harrison v Blackburn* (1864) 17 CBNS 678 at 690 per Erle CJ; and see *Johnson v Edgware etc Rly Co* (1866) 35 Beav 480 (where in a power to resume possession of any part of demised land 'for the purpose of building, planting, accommodation, or otherwise', 'otherwise' was read ejusdem generis, and did not authorise the resumption of land required by a railway company). If the particular words exhaust a whole genus, however, the general words must refer to some larger genus: *Fenwick v Schmalz* (1868) LR 3 CP 313 at 315 per Willes J.

2 *Johnson v Edgware etc Rly Co* (1866) 35 Beav 480; *Coates v Diment* [1951] 1 All ER 890 at 898 per Streetfield J; *Chandris v Isbrandtsen-Moller Co Ltd* [1951] 1 KB 240 at 246-247, [1950] 1 All ER 768 at 773 per Devlin J.

3 Where, for instance, in a covenant to yield up fixtures at the end of a term, the fixtures particularly enumerated are all 'landlord's fixtures', the general words will be restricted to the same class: *Lambourn v McLellan* [1903] 2 Ch 268, CA. Where an annuity is charged on 'rents or profits or any other moneys' in the hands of trustees, the frame of the deed may readily show that 'other moneys' are to be restricted to moneys in the nature of income (*Chifford v Arundell* (1860) 1 De GF & J 307); where a specific description of leasehold property is followed by general words referring to leaseholds only, freehold property will not pass (*Doungworth v Blair* (1837) 1 Keen 795). The words 'any other cause' following certain specified causes were construed ejusdem generis with the specified causes in *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385, CA; *Mudie & Co v Strick* (1909) 100 LT 701; *Herman v Morris* (1919) 35 TLR 574, CA. See also *Bolivia Republic v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785, CA; *Thorman v Dowgate Steamship Co Ltd* [1910] 1 KB 410; *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, HL; and for a discussion of the rule see *Owners of Magnhild v McIntyre Bros & Co* [1920] 3 KB 321.

4 Eg if it will lead to a forfeiture of the property which it is contended is included in the general words: *Re Waley's Trusts* (1855) 3 Drew 165.

5 *Cullen v Butler* (1816) 5 M & S 461; *Lee v Alexander* (1883) 8 App Cas 853, HL; *Thames and Mersey Marine Insurance Co v Hamilton Fraser & Co* (1887) 12 App Cas 484, HL; and see *Crompton v Jarratt* (1885) 30 ChD 298, CA; *Early v Rathbone* (1888) 57 LJ Ch 652; *Lambourn v McLellan* [1903] 2 Ch 268, CA; *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385; *Larsen v Sylvester & Co* [1908] AC 295, HL; *Mudie & Co v Strick* (1909) 100 LT 701; *Thorman v Dowgate Steamship Co Ltd* [1910] 1 KB 410; *Hadjipateras v s Weigall & Co* (1918) 34 TLR 360; *Herman v Morris* (1919) 35 TLR 574, CA; *Owners of Magnhild v McIntyre Bros & Co* [1920] 3 KB 321. See also INSURANCE vol 25 (2003 Reissue) PARA 231; CARRIAGE AND CARRIERS vol 7 (2008) PARA 228; STATUTES vol 44(1) (Reissue) PARA 1491.



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### **(iii) General Words Conveying Appurtenances, and Conveying or Creating Easements**

#### **235. Use of general words.**

In addition to general words of description which either supply defects in the enumeration of things of a specific class (in accordance with the rule of *eiusdem generis*<sup>1</sup>) or add other land or things not included in the previous enumeration<sup>2</sup>, there may be general words intended to bring in various rights incidental to the enjoyment of the property conveyed, for though by statute an appurtenant easement passes without the necessity of express mention or the use of general words<sup>3</sup>, nevertheless such mention or general words may still appear in conveyances.

A grant of an easement by general words in a conveyance will be construed as being referable only to the interest which the grantor had in the servient tenement at the time of the grant, and will not bind any larger interest which he may afterwards acquire<sup>4</sup>.

The use of general words was always unnecessary in respect of many rights incident to the enjoyment of land, since the mere grant of the property described in the parcels carried the rights as a matter of course, unless expressly excepted<sup>5</sup>.

1 See PARA 234 ante.

2 See PARA 233 ante.

3 See PARA 236 post.

4 *Booth v Alcock*(1873) 8 Ch App 663 at 667 per Mellish LJ. See also *Beddington v Atlee*(1887) 35 ChD 317 at 327.

5 This was expressed by the maxim 'cuicunque aliquid conceditur, etiam id sine quo res ipsa non esse potuit'.

'When anything is granted, all the means to attain it, and all the fruits and effects of it are granted also; and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words 'cum pertinentiis', or other like words': Shep Touch 89; *Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 207; *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 360; *Ramsay v Blair*(1876) 1 App Cas 701 at 703, HL. See also COMMONS vol 13 (2009) PARA 469.



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### **236. Conveyance under the Law of Property Act 1925.**

In order to shorten the length of conveyances of land it is provided by statute<sup>1</sup> that as regards conveyances made since 31 December 1881, a conveyance<sup>2</sup> of land<sup>3</sup> is deemed to include and is to operate to convey with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining<sup>4</sup> or reputed to appertain to the land, or any part thereof, or at the time of conveyance<sup>5</sup> demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part of it<sup>6</sup>. A conveyance since 31 December 1881 of land, having houses or other buildings on it, is deemed to include and operates to convey with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance<sup>7</sup>, demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses or other buildings, conveyed, or any of them, or any part thereof<sup>8</sup>. Corresponding provision is made as to the appurtenances and rights which are deemed to be included in a conveyance of a manor<sup>9</sup>.

These statutory provisions apply only if and so far as a contrary intention is not expressed in the conveyance, and they are subject to the terms and provisions of the instrument<sup>10</sup>. Correspondence leading up to the conveyance may be material as showing that a right which was permissive only had been terminated by withdrawal of permission before the conveyance<sup>11</sup>.

The statutory provisions are not to be construed as giving to any person a better title to any property, right or thing mentioned in the statutory provisions than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him such property, right or thing, further or otherwise than as the same could have been conveyed to him by the conveying parties<sup>12</sup>. Their object is to show what general words are to be taken as included in a conveyance of land where the conveyance is otherwise silent<sup>13</sup>. They do not affect the contract, so that neither party to the contract is entitled to have these general words included in the conveyance, unless they are justified by the contract and appropriate to the circumstances of the case<sup>14</sup>.

1 See the Law of Property Act 1925 s 62 (replacing the Conveyancing Act 1881 s 6); and EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 57. Any conveyance executed for the purpose of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended), and a lease granted back to the former freeholder in accordance with s 36 (as amended; prospectively amended), must not exclude or restrict the general words implied in conveyances under the Law of Property Act 1925 s 62, or the all-estate clause implied under s 63 (see PARA 240 post), unless the exclusion or restriction is made for the purpose of preserving or recognising any existing interest of the freeholder in tenant's incumbrances or any existing right or interest of any other person, or the nominee purchaser consents to the exclusion or restriction: see the Leasehold Reform, Housing and Urban Development Act 1993 s 34(1) (as amended; prospectively amended), s 36(4), Sch 7 para 2(1) (prospectively amended), Sch 9 Pt IV para 9; and LANDLORD AND TENANT. As to the effect of this provision on the severance of a holding in creating rights and burdens as between the severed parts see further EASEMENTS AND PROFITS A PRENDRE.

2 For the meaning of 'conveyance' see PARA 14 note 1 ante. For this purpose, a tenancy agreement for a term not exceeding three years, though under hand only and though expressed as an agreement, has been held to be a conveyance: *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA.

3 As to the meaning of 'land' see PARA 14 note 2 ante.

4 Formerly the words 'with the appurtenances' were frequently used (see *Thorpe v Brumfitt* (1873) 8 Ch App 650 (right of way)); but they were in general superfluous, for they referred only to rights strictly appurtenant to the property conveyed (*Bolton v Bolton* (1879) 11 ChD 968 at 971), and such rights passed by the conveyance without these words (Co Litt 121b; *Shep Touch* 89; *Skull v Glenister* (1864) 16 CBNS 81 at 91); hence the words did not pass an easement formerly existing which had been extinguished by unity of possession (*Plant v James*) (1833) 5 B & Ad 791 at 794 (on appeal sub nom *James v Plant* (1836) 4 Ad & El 749, Ex Ch); *Worthington v Gimson* (1860) 2 E & E 618; and see *Baring v Abingdon* [1892] 2 Ch 374 at 394, CA). The words 'with all ways thereunto appertaining' were similarly restricted to ways legally appurtenant to the conveyed premises: *Harding v Wilson* (1823) 2 B & C 96 at 100; *Barlow v Rhodes* (1833) 1 Cr & M 439 at 448; *Brett v Clowser* (1880) 5 CPD 376 at 383. But such words received a wider construction if there was apparent an intention to pass rights not strictly appurtenant; where, for example, there was no way strictly appurtenant to which the words could apply (*Morris v Edgington* (1810) 3 Taunt 24), or where such an intention appeared from the conveyance itself (*Barlow v Rhodes* supra; *James v Plant* (1836) 4 Ad & El 749, Ex Ch; *Dobbyn v Somers* (1860) 13 ICLR 293). In such cases the word 'appurtenant' might be taken in a secondary sense as equivalent to 'used and enjoyed' with the premises conveyed: *Hill v Grange* (1555) 1 Plowd 164 at 170; *Thomas v Owen* (1887) 20 QBD 225 at 232, CA; and see *Hinchcliffe v Earl of Kinnoul* (1838) 5 Bing NC 1 at 25. Under the words 'with the appurtenances' there will pass, as appurtenant to a house (Co Litt 121b), a right of turbary (*Solme v Bullock* (1684) 3 Lev 165; *Dobbyn v Somers* supra); and where a right would not by itself pass without a deed the words may show that the right is treated as appurtenant so as to pass by the conveyance, although not by deed (see *Hurleston v Woodroffe* (1619) Cro Jac 519 (a sheep walk)); and probably a right of common can pass as appurtenant without a deed; but see *Beaudley v Brook* (1607) Cro Jac 189 at 190. Moreover, rights necessary for the enjoyment of the property conveyed, which the grantor can confer, will pass without express mention (see PARA 235 note 5 ante); but a lease of land and buildings with a pond and the streams leading thereto does not entitle the lessee to water which would percolate to the pond through other land of the lessor (*M'Nab v Robertson* [1897] AC 129, HL).

5 See note 7 infra.

6 See the Law of Property Act 1925 s 62(1), (6); and note 1 supra. Something which by sufferance no one is prevented from doing or enjoying will not pass as a right under s 62, for the words of the provision connote something which is the subject of individual or class enjoyment as opposed to general enjoyment and must therefore be enjoyed in connection with the subject matter of the conveyance: *Le Strange v Pettefar* (1939) 161 LT 300 at 301. The enjoyment must not be merely an enjoyment based on ownership of the quasi-servient tenement by a common owner of both quasi-servient and quasi-dominant tenement: *Long v Gowlett* [1923] 2 Ch 177; and cf *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609. Easements which are reputed to be enjoyed with the land conveyed will pass under the statute although not subsisting at law: see *Lewis v Meredith* [1913] 1 Ch 571; *Hansford v Jago* [1921] 1 Ch 322. See EASEMENTS AND PROFITS A PRENDRE. In *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA, the right to have the fences of neighbouring farmers kept up was held to be a right in the nature of an easement passing under the statute. To pass under it, the right or advantage must be one which is known to the law in the sense that it must be capable of being granted at law so as to be binding on all successors in the title even those who take without notice: *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA. Cf *Chelsea Yacht and Boat Co Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1941, CA (moored, but moveable, houseboat neither land nor a fixture).

7 In the case of a lease the 'time of the conveyance' is the date of execution, not the date of the commencement of the term: *Goldberg v Edwards* [1950] Ch 247, CA.

8 See the Law of Property Act 1925 s 62(2), (6). In *HE Dibble Ltd (t/as Mill Lane Nurseries) v Moore (West, third party)* [1970] 2 QB 181, [1969] 3 All ER 1465, CA, greenhouses resting on concrete were held not to be part of the land and therefore not 'erections'. See also *Deen v Andrews* (1986) 52 P & CR 17, [1986] 1 EGLR 262 (greenhouse not a 'building' under a contract for the sale of land 'together with the farmhouses and other buildings'); *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL (bungalow resting on concrete foundations by its own weight not a fixture but part and parcel of the land).

9 See the Law of Property Act 1925 s 62(3), (6).

10 See *ibid* s 62(4). Such a contrary intention is not indicated by the express grant of a limited easement when the habendum refers to a wider right (*Gregg v Richards* [1926] Ch 521, CA), nor by the fact that a conveyance expressly conveys such easements as were included in an earlier conveyance which did not include the easement in question (*Hapgood v JH Martin & Son Ltd* (1934) 152 LT 72), nor by the use of the words 'with the appurtenances' (*Beddington v Atlee* (1887) 35 ChD 317 at 331; *Hansford v Jago* [1921] 1 Ch 322 at 332; but see *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 ChD 295 at 308, CA), though the use of such words in a contract may limit the conveyance to one of rights strictly appurtenant and exclude the operation of the Law of Property Act 1925 s 62(1) (*Re Peck and London School Board's Contract*) [1893] 2 Ch 315). The mere marking of adjacent land as 'building land' on a plan will not show an intention to exclude a right of light over it: *Broomfield v Williams* [1897] 1 Ch 602, CA; *Pollard v Gare* [1901] 1 Ch 834. Further, in considering whether the

statutory words apply, regard must be had to the title to the quasi-servient tenement and to the surrounding circumstances at the time of the conveyance, and the statute will not pass rights de facto enjoyed with the demised premises if, as a matter of title, the grantor cannot lawfully convey these rights (*Beddington v Atlee* supra; *Godwin v Schweppes Ltd* [1902] 1 Ch 926 at 932; *Quicke v Chapman* [1903] 1 Ch 659, CA; *Financial Times Ltd v Bell* (1903) 19 TLR 433); nor rights which are merely temporary (*Burrows v Lang* [1901] 2 Ch 502) or which could not reasonably be expected to continue (*Godwin v Schweppes Ltd* supra); but a conveyance may, by virtue of the statute, pass rights which at its date are permissive only (*International Tea Stores Co v Hobbs* [1903] 2 Ch 165) provided that these are sufficiently precise in extent to be the subject of a grant (*Green v Ashco Horticulturist Ltd* [1966] 2 All ER 232, [1966] 1 WLR 889). Cf *Bolton v Bolton* (1879) 11 ChD 968; *Bayley v Great Western Rly Co* (1884) 26 ChD 434 at 457, CA; *Barkshire v Grubb* (1881) 18 ChD 616.

11 *Le Strange v Pettefar* (1939) 161 LT 300 at 302.

12 See the Law of Property Act 1925 s 62(5); and see eg *Quicke v Chapman* [1903] 1 Ch 659, CA. A tenant's right under an earlier lease to receive a supply of hot water and central heating, being essentially a matter of a contract for personal services, will not pass under the general words implied by the Law of Property Act 1925 s 62 in a new lease: *Regis Property Co Ltd v Redman* [1956] 2 QB 612, [1956] 2 All ER 335, CA.

13 *Re Peck and London School Board's Contract* [1893] 2 Ch 315.

14 *Re Hughes and Ashley's Contract* [1900] 2 Ch 595 at 603, CA; *Re Peck and London School Board's Contract* [1893] 2 Ch 315 at 318 per Chitty J; *Re Walmesley and Shaw's Contract* [1917] 1 Ch 93; *Clark v Barnes* [1929] 2 Ch 368.

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#### **(iv) Exceptions and Reservations**

##### **237. Distinction between exception and reservation.**

An exception is always of part of the thing granted, and only a thing which exists can be excepted; a reservation is of a thing not in existence, but newly created or reserved out of land or a tenement upon a grant thereof<sup>1</sup>.

<sup>1</sup> Co Litt 47a; Shep Touch 80. As to exceptions see PARA 238 post; and as to reservations see PARA 239 post.

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### 238. Exceptions.

Upon the grant of land there may be an exception of a specified part, and then this is not included in the grant at all<sup>1</sup>, and where the amount to be excepted is specified, but not its position, the uncertainty can be determined by election<sup>2</sup>. The rule for construing exceptions is that what will pass by words in a grant will be excepted by the same or like words in an exception<sup>3</sup>. A vendor who wishes to except some part of the property from parcels which are clearly described and admittedly included in the conveyance must use language which is apt for the purpose<sup>4</sup>. Trees or minerals may be excepted<sup>5</sup>. An exception of trees is held not to extend to fruit trees<sup>6</sup>, but it carries so much of the soil as is necessary for the growth of the trees<sup>7</sup>. An exception of 'mines', or of any mineral occupying a continuous space, is an exception also of the space occupied<sup>8</sup>; but a reservation of a right to get minerals does not operate as an exception of the minerals themselves, unless an intention to that effect is clearly shown<sup>9</sup>. An exception of trees<sup>10</sup> or of minerals<sup>11</sup> carries with it the right to do all things necessary<sup>12</sup> for getting and disposing of them. A reservation may in substance be an exception, as where there is a reservation of part of the thing granted<sup>13</sup>; but the reservation will be void if it is repugnant to the grant as a reservation of part of the profits of what is granted<sup>14</sup>.

1 *Doe Douglas v Lock* (1835) 2 Ad & El 705 at 744.

2 *Jenkins v Green* (1858) 27 Beav 437; and see PARA 213 ante.

3 Shep Touch 100. If the exception covers the whole of anything specifically granted as an exception of 'shops' out of a grant of a messuage 'with all the chambers, cellars, and shops', it is repugnant and therefore void: *Horneby v Clifton* (1567) 3 Dyer 264b; *Cochrane v M'Cleary* (1869) IR 4 CL 165, Ex Ch; and see *Cooper v Stuart* (1889) 14 App Cas 286 at 289, PC. As to construing an exception in favour of the grantee see PARA 178 ante.

4 *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA (cellar of house conveyed not excepted although accessible only from other property of the vendor).

5 *Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 207.

6 *Wyndham v Way* (1812) 4 Taunt 316 at 318n (a); and see *London v Chapter of Southwell Collegiate Church* (1618) Hob 303; *Bullen v Denning* (1826) 5 B & C 842. See also FORESTRY vol 52 (2009) PARAS 54-55; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 191.

7 *Ive's Case* (1597) 5 Co Rep 11a; Cro Eliz 521; *Liford's Case* (1614) 11 Co Rep 46b. An exception of 'all wood and underwood' perhaps carries the exception of soil further: *Legh v Heald* (1830) 1 B & Ad 622 at 626.

8 *Proud v Bates* (1865) 34 LJ Ch 406; *Duke of Hamilton v Graham* (1871) LR 2 Sc & Div 166, HL.

9 *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 483, CA; cf *Duke of Hamilton v Dunlop* (1885) 10 App Cas 813, HL. As to exceptions of minerals see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 309.

10 Shep Touch 100; *Liford's Case* (1614) 11 Co Rep 46b at 52a; *Hewitt v Isham* (1851) 7 Exch 77.

11 *Earl of Cardigan v Armitage* (1823) 2 B & C 197; *Dand v Kingscote* (1840) 6 M & W 174 at 196; *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 360; *Ramsay v Blair* (1876) 1 App Cas 701 at 703, HL.

12 Consequently rights which are merely convenient for, but not necessarily incident to, the getting of the thing excepted are not implied by the exception: see *Lord Darcy v Askwith* (1618) Hob 234; *Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 211. See also PARA 184 note 5 ante.

13 Co Litt 143a; *Anon* (1536) 1 Dyer 19a, pl 110; *Fancy v Scott* (1828) 2 Man & Ry KB 335; and see *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 745.

14 Co Litt 142a.

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### 239. Reservations.

Strictly the term 'reservation', implies a right of the nature of rent reserved to a landlord or lord of a manor; thus rent, heriots, suit of mill, and suit of court are reservations, and have been described as the only things, which, according to the legal meaning of the word, are reservations<sup>1</sup>. It is essential to a reservation that it should issue out of the thing granted<sup>2</sup>. The term is frequently used, however, to denote some incorporeal right over a thing granted of which the grantor intends to have the benefit, such as a fishing right or sporting right<sup>3</sup> or a right of way<sup>4</sup>. In this case the reservation formerly operated as a regrant of the right of the grantee to the grantor, and it was not effectual unless the deed in which it was contained was executed by the grantee<sup>5</sup>.

In instruments executed after 1925, a reservation of a legal estate<sup>6</sup> operates at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person, whether that person is the grantor or not, for whose benefit the reservation is made<sup>7</sup>. A conveyance of a legal estate expressed to be made subject to a legal estate not yet in existence immediately before the date of the conveyance, operates as a reservation unless a contrary intention appears<sup>8</sup>.

The reservation of a substance out of the land granted necessarily implies the existence of a right of working and of recovering that substance, for without it the reservation would be meaningless<sup>9</sup>; and where a reservation makes a direct grant of a substance to the vendor, leaving to the purchaser merely such residual rights as remain in him subject to the vendor, and the recovery of the reserved substance by the usual methods involves the egress of another substance which has not been reserved, the vendors are not under an obligation to conserve that other substance, with the consequent denial of their right to recover the reserved substance in the usual way<sup>10</sup>.

1 *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 743. 'Heriot' means the best beast or other chattel of a tenant, seized on his death by the lord. 'Suit of court' means the attendance which tenants owed to the court of their lord.

2 *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940 at 967, Ex Ch.

3 *Doe d Douglas v Lock* (1835) 2 Ad & El 705; *Wickham v Hawker* (1840) 7 M & W 63; and see further ANIMALS vol 2 (2008) PARA 763 et seq.

4 *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940, Ex Ch.

5 *Doe d Douglas v Lock* (1835) 2 Ad & El 705; *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940; and see *Thellusson v Liddard* [1900] 2 Ch 635 at 645. As to construing a reservation in favour of the grantee of the property out of which the reservation is made see PARA 178 ante.

6 The term 'legal estate' includes an easement or right for an interest equivalent to a fee simple or term of years: see the Law of Property Act 1925 s 1(2)(a), (4).

7 *Ibid* s 65(1), (3); and see *Wickham v Hawker* (1840) 7 M & W 63. This statutory provision does not affect the substance of the obligations: see *Mason v Clarke* [1954] 1 QB 460 at 467, [1954] 1 All ER 189 at 192, CA, per Denning LJ (revsd but not on this point [1955] AC 778, [1955] 1 All ER 914, HL); *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772, [1975] 1 WLR 468, CA.

8 Law of Property Act 1925 s 65(2). See *Wiles v Banks* (1984) 50 P & CR 80, CA.

9     Shep Touch 89; *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 360 per Lord Wensleydale; *Ramsay v Blair* (1876) 1 App Cas 701 at 704, HL, per Lord Hatherley; *Borys v Canadian Pacific Rly Co* [1953] AC 217 at 227-228, 232, [1953] 1 All ER 451 at 457-458, 460, PC.

10     *Borys v Canadian Pacific Rly Co* [1953] AC 217 at 229-230, [1953] 1 All ER 451 at 459, PC.



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## **(v) 'All Estate' Clauses**

### **240. Effect of all estate clause.**

Formerly, it was usual to add to the parcels general words, known as the 'all estate' clause, expressing that the grantor conveyed all his 'estate, interest, right, title<sup>1</sup>, claim<sup>2</sup>, and demand' in, to, or upon the property conveyed. Now every conveyance made after 31 December 1881 passes all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, or have power to convey, in the property. This rule applies only if and so far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms and provisions of the conveyance<sup>3</sup>.

The ordinary effect of a conveyance containing these general words, or operating under the above statutory rule, is to convey every estate or interest vested in the grantor, although not vested in him in the character in which he became a party to the conveyance<sup>4</sup>. If he purports to convey the fee simple, but has in fact only an equitable title to a term, that equitable title will pass<sup>5</sup>.

1 As to the distinction between these words see Co Litt 345a, b. According to the old nomenclature, 'estates' are the interests created in land by legal and equitable limitations; 'right' is properly where an estate is turned to a right of entry, as by dissuasion; 'title' is either a lawful cause of entry to defeat an existing estate, as title of condition, or, more generally, it includes 'right'; 'interest' is the widest term, and includes estates, rights and titles. For the purposes of the Law of Property Act 1925, however, 'legal estate' means the estates, interests, and charges, which under s 1 (as amended) are authorised to subsist or to be conveyed or created at law (see ss 1(4), 205(1)(x)), and all other estates, interests, and charges in or over land take effect as equitable interests (see ss 1(3), s 205(1)(x) (as amended)): see SETTLEMENTS vol 42 (Reissue) PARA 677. For the meaning of 'equitable interests' see MORTGAGE vol 77 (2010) PARA 105.

2 'Claim' will cover a contingent interest, notwithstanding that it would properly be called a possibility: *Wright v Wright* (1750) 1 Ves Sen 409.

3 See the Law of Property Act 1925 s 63 (reproducing the Conveyancing Act 1881 s 63 (repealed)). Any conveyance executed for the purpose of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) must not exclude or restrict the general words implied in conveyances under the Law of Property Act 1925 s 62 (see PARA 236 ante) or the all-estate clause implied under s 63, unless the exclusion or restriction is made for the purpose of preserving or recognising any existing interest of the freeholder in tenant's incumbrances or any existing right or interest of any other person, or the nominee purchaser consents to the exclusion or restriction: see the Leasehold Reform, Housing and Urban Development Act 1993 s 34(1) (as amended; prospectively amended), Sch 7 para 2(1) (prospectively amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1648.

In *Re Stirrup's Contract*[1961] 1 All ER 805, [1961] 1 WLR 449, the Law of Property Act 1925 s 63, read with the definition of a conveyance in s 205(1)(ii) (see PARA 14 note 1 ante) and having regard to the broad framework of the Act, was held to produce the result that an instrument in the form of an assent, but happening to be under seal and so complying with s 52(1) (see PARA 14 ante), was effective to pass whatever estate the conveying party had. Tithe rentcharge (extinguished, with certain exceptions, by the Tithe Act 1936 s 47(1): see ECCLESIASTICAL LAW vol 14 para 1213) is, like tithe, a hereditament separate from the land; and express words are necessary to pass it: *Public Trustee v Duchy of Lancaster*[1927] 1 KB 516, CA.

4 *Drew v Earl Norbury* (1846) 3 Jo & Lat 267 at 284 per Lord St Leonards LC; *Taylor v London and County Banking Co*[1901] 2 Ch 231 at 256, CA, per Stirling LJ; Co Litt 345a; Shep Touch 98; *Johnson v Webster* (1854) 4 De GM & G 474 at 488. Thus a conveyance will carry both the fee and a term of years vested in the grantor, but not merged: *Burton v Barclay* (1831) 7 Bing 745 at 761.

5 *Thellusson v Liddard*[1900] 2 Ch 635. See also the forgery cases at para 72 ante.



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## **241. Construction of estate clause.**

The words of the estate clause or of the statutory rule, being general words, are subject to the same elasticity of construction as general words in the parcels. They are liable to be controlled by recitals<sup>1</sup>, by the scope of the deed read as a whole, and by the surrounding circumstances<sup>2</sup>. A disentailing deed will be restricted to the estate tail which appears to be intended to be barred, and will not extend to another contingent estate tail<sup>3</sup>.

<sup>1</sup> See PARA 219 ante.

<sup>2</sup> *Re Cooke and Bletcher's Contract* (1895) 13 R 264; *Williams v Pinckney* (1897) 67 LJ Ch 34 at 39, CA. Thus it may appear that a reversion was not intended to pass: *Mullineaux v Ellison* (1863) 8 LT 236. A mortgage deed intended to pass the freehold of certain property, when acquired by the mortgagor under an option to purchase it, was construed, the purchase never having been made, as not comprising a leasehold estate in the property belonging throughout to the mortgagor, although the deed thus became inoperative: *Goodwin v Noble* (1857) 8 E & B 587. A purported conveyance of certain property in fee in the most general words was held, on the construction of the deed as a whole, to pass only the moiety of the property of which the grantor was actually seised in fee and not a moiety of which he was only the lessee: *Francis v Minton* (1867) LR 2 CP 543 (for the abolition of tenancies in common at law see REAL PROPERTY vol 39(2) (Reissue) PARA 55). See also *Grieverson v Kirsopp* (1842) 5 Beav 283, where, although expressly referring to a moiety, a deed was held to comprise a fifth part only having regard to its general intention. On the other hand, an interest omitted by mistake in the recitals, and in the express operative part, may pass under the general words: *Knapping v Tomlinson* (1870) 18 WR 684.

<sup>3</sup> *Grattan v Langdale* (1883) 11 LR Ir 473, 478. See further PARA 226 et seq ante. As from 1 January 1997 (ie the date on which the Trusts of Land and Appointment of Trustees Act 1996 came into force: see s 27(2)), it is no longer possible to create a new settlement under the Settled Land Act 1925: see s 2; and SETTLEMENTS vol 42 (Reissue) PARA 676. As to the limited exceptions see s 2(2), (3); and SETTLEMENTS vol 42 (Reissue) PARA 676.

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## **(9) THE PREMISES AND THE HABENDUM**

### **242. Purposes of premises and habendum.**

The parts of a deed before the habendum are called the premises of the deed. Their purpose is to name the grantor and grantee, and to define the thing which is granted. In addition, the circumstances preliminary to and leading up to the transaction are stated in the recitals. The office of the habendum is to limit the estate granted, and in doing this the grantee is mentioned again<sup>1</sup>, and any liabilities or incidents subject to which the property is conveyed are mentioned<sup>2</sup>. The habendum is not essential, and if the premises, in addition to defining the grantor, the grantee, and the parcels, define also the estate to be taken by the grantee, or leave that to construction of law<sup>3</sup>, the deed is effectual<sup>4</sup>.

Since a fee simple is the only estate of freehold at law and can now be transferred without words of limitation,<sup>5</sup> words of limitation are only required in the conveyance of an equitable interest, such as an interest for life, though it is usual to insert the words 'in fee simple' in a conveyance of the legal estate<sup>6</sup>. On the sale of land subject to a specified incumbrance or lease, the vendor is entitled to have the conveyance framed accordingly<sup>7</sup>; but he cannot insist on property being conveyed subject to covenants, conditions, and restrictions not mentioned in the abstract<sup>8</sup>, or which, though mentioned in the abstract, were not referred to in the particulars or conditions<sup>9</sup>.

1 *Buckler's Case* (1597) 2 Co Rep 55a; *Throchmerton v Tracy* (1555) 1 Plowd 145 at 152; Co Litt 6a; Shep Touch 74.

2 The statement in the habendum that the property is subject to certain restrictions does not, however, by itself impose any contractual obligation on the purchase: *Re Rutherford's Conveyance, Goadby v Bartlett*[1938] Ch 396, [1938] 1 All ER 495.

3 A conveyance of freehold land without words of limitation now passes to the grantee the fee simple if the grantor has power to convey it: see note 6 infra.

4 *Goodtitle d Dodwell v Gibbs* (1826) 5 B & C 709 at 717; Shep Touch 75; *Kerr v Kerr* (1854) 4 I Ch R 493 at 497.

5 See the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 36.

6 Formerly, words of limitation were necessary in a deed in order to confer on the grantee the fee simple. In the absence of the appropriate words ('heirs', 'heirs and assigns', or 'in fee simple'), the grantee took only an estate for life, and this applied also to equitable limitations: *Re Bostock's Settlement, Norrish v Bostock*[1921] 2 Ch 469, CA. In a conveyance of freehold land executed after 1925 without words of limitation, the fee simple or other whole interest which the grantor had power to convey in such land passes to the grantee, unless a contrary intention appears in the conveyance: Law of Property Act 1925 s 60(1), (4). Until 1882 the word 'heirs' was essential to pass the fee simple; after 1881 the words 'in fee simple' were sufficient: see s 60(4)(a) (replacing the Conveyancing Act 1881 s 51 (repealed)). Since the rules of descent have been abolished, 'heirs' is not now appropriate as a word of limitation, though the heir may still take an equitable interest by purchase: see the Law of Property Act 1925 s 132(1); and REAL PROPERTY vol 39(2) (Reissue) PARAS 89, 1415. As to conveyance to a corporation sole without using the word 'successors' see the Law of Property Act 1925 s 60(2); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1248; REAL PROPERTY vol 39(2) (Reissue) PARA 93.

7 See *David v Sabin*[1893] 1 Ch 523, CA; *Page v Midland Rly Co*[1894] 1 Ch 11, CA; *May v Platt*[1900] 1 Ch 616.

8 *Re Monckton and Gilzean*(1884) 27 ChD 555.

9     *Hardman v Child*(1885) 28 ChD 712; *Re Wallis and Barnard's Contract*[1899] 2 Ch 515.

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### **243. Effect of limitation in premises.**

In the premises the grant should be to the grantee simply without words of limitation, and if the estate is expressly limited<sup>1</sup>, this should be done in the habendum. Formerly a grant without words of limitation gave only an estate for life<sup>2</sup>, and if there was a simple grant to the grantee in the premises and no habendum at all, the grantee would take an estate for life; but if the habendum contained the limitation of the estate, this excluded any implication of a life estate in the premises, and the grantee took the estate limited in the habendum<sup>3</sup>; or if the estate so limited was contrary to the rules of law, the deed was void<sup>4</sup>.

1 See PARA 242 note 3 ante. For the meaning of 'premises' see PARA 242 ante.

2 See PARA 242 note 6 ante.

3 *Goodtitle d Dodwell v Gibbs* (1826) 5 B & C 709. Upon a grant to A and B, habendum to A for life, remainder to B for life, the limitation in the habendum excluded the joint tenancy for life which would have been implied from the premises, and gave estates to A and B for life in succession: *Buckler's Case* (1597) 2 Co Rep 55a at 55b; Co Litt 183b; and see also *Scovel v Cabell* (1588) Cro Eliz 89 at 107; *Anon* (1562) Moore KB 43 pl 133.

4 Thus, on a grant by A to C, habendum to B in tail after the death of A, the express limitation in the habendum was void as attempting to create a future freehold, and, since no limitation could be implied in the premises, the grant was void: *Hogg v Cross* (1591) Cro Eliz 254; *Buckler's Case* (1597) 2 Co Rep 55a; *Stukeley v Butler* (1614) Hob 168 at 171.

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#### **244. Habendum cannot cut down estate.**

Where an estate has been limited in the premises, this has been treated as indicating the intention of the grantor, and it was formerly generally accepted that the subsequent limitation in the habendum, although it might enlarge the limitation in the premises<sup>1</sup>, or might qualify or explain it<sup>2</sup>, could not directly abridge it<sup>3</sup>, and, so far as repugnant to it or contrary to the rules of law, was to be disregarded<sup>4</sup>.

The possibility of contradictions between an estate limited in the premises and the estate limited in the habendum has been removed in the case of grants of legal estates of freehold by the rule that the only estate of freehold which can be conveyed is the fee simple absolute<sup>5</sup>, although contradictions may still occur in limitations of equitable interests.

1 See *Kendal v Micfield* (1740) Barn Ch 46 at 47-48, where a grant to A and the heirs of his body, habendum to A and his heirs, gave a fee simple. Sometimes this was said to give an estate tail, and a fee simple expectant: *Altham's Case* (1610) 8 Co Rep 150b at 154b.

2 Thus, in a grant to A and his heirs, habendum to A and the heirs of his body, the habendum explained 'heirs' in the premises, and A took only an estate tail (*Altham's Case* (1610) 8 Co Rep 150b); unless on the whole deed the fee was held to pass (*Turnman v Cooper* (1619) Cro Jac 476). Similarly, upon a grant to A, his heirs and assigns, habendum to A and his assigns during the life of B, the estate for the life of another in the habendum showed that heirs in the premises was used to denote the heir as special occupant, and not as a word of limitation: *Doe d Timmis v Steele* (1843) 4 QB 663; and see also *Pilsworth v Pyet* (1671) T Jo 4; *Pigot v Salisbury* (1674) Poll 146 at 151; *Kerr v Kerr* (1854) 4 1 Ch R 493. The habendum, though void, might, with other parts of the deed, be looked at for the purpose of qualifying the estate granted by the premises: *Throckmerton v Tracy* (1555) 1 Plowd 145 at 153, 160; *Hagarty v Nally* (1862) 13 ICLR 532.

3 See *Throckmerton v Tracy* (1555) 1 Plowd 145; *Kendal v Micfield* (1740) Barn Ch 46; Co Litt 299a. As to ships see *Reid v Fairbanks* (1853) 13 CB 692.

4 See *Carter v Madgwick* (1692) 3 Lev 339; *Goodtitle d Dodwell v Gibbs* (1826) 5 B & C 709 at 717 (where an immediate estate of freehold limited in the premises took effect, and a limitation of a future freehold in the habendum was rejected); *Doe d Timmis v Steele* (1843) 4 QB 663 at 667; *Boddington v Robinson* (1875) LR 10 Exch 270 at 273. In this last case a grant by a tenant for life to J, his executors, administrators, and assigns, was held to be an express limitation for the life of another, but as to this see Challis *Real Property* (3rd Edn) 104, 109, and it prevailed over the limitation of a future freehold in the habendum. See also *Underhay v Underhay* (1592) Cro Eliz 269; and cf *Goshawke v Chiggell* (1629) Cro Car 154; *Bernard v Bonner* (1648) Aleyn 58 at 59; *Germain v Orchard* (1691) 1 Salk 346.

5 See the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 36.

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#### **245. Grantee different in premises and habendum.**

Although the premises ought to contain the name of the grantee, if his name is omitted there, it is sufficient that it is mentioned in the habendum<sup>1</sup>. Under the former law, if a grantee was named in the premises, and the habendum was to him and another, then only the grantee named in the premises could take an immediate estate<sup>2</sup>, though the other might take by way of remainder if the limitation in the habendum could be construed as giving him such an estate<sup>3</sup>. If the grant in the premises was to A, habendum to B, the effect was similar; A took an immediate estate and the habendum was void<sup>4</sup>, unless it gave to B an estate in remainder after A's estate<sup>5</sup>.

As the only legal estate of freehold which may now be conveyed is an estate in fee simple absolute in possession<sup>6</sup>, the construction giving the co-grantee in the habendum an estate by way of remainder could only apply to limitations of an equitable interest, and the possibility of successive leases is restricted by the rule that a term limited to take effect more than 21 years from the date of the instrument purporting to create it is void<sup>7</sup>.

1 *Spyve v Topham* (1802) 3 East 115; Co Litt 7a; Shep Touch 75. As to leases see *Butler v Dodton* (1579) Cary 86; *Eeles v Lambert* (1648) Aleyn 38 at 41. The contrary opinion in *Bustard v Coulter* (1602) Cro Eliz 902, was not accepted, and in that case, at 917, the omission of the grantee in the premises was held to be cured by the pleadings.

2 *Sammes's Case* (1609) 13 Co Rep 54; *Kirkman and Reignold's Case* (1588) 2 Leon 1. This rule did not formerly affect the limitation of the use, which in such a case might be to A and B (*Sammes's Case* supra); but conveyances to uses were abolished by the repeal of the Statute of Uses (1535) by the Law of Property Act 1925 s 207, Sch 7 (repealed).

3 Co Litt 231a. A lease to A, habendum to A, B and C in succession was void for the uncertainty as to who should begin; but if the habendum was to A, B and C, in the order in which they were written, this was good and they took in succession (*Windsmore v Hobart* (1585) Hob 313; *Grubham's Case* (1613) 4 Leon 246); and similarly in the case of a grant to A, habendum to A and his wife for their lives in succession (*Wheadon v Sugg* (1615) Cro Jac 372; cf *Greenwood v Tyber* (1620) Cro Jac 563; and see *Cochin v Heathcote* (1773) Lofft 190).

4 See *Anon* (1573) 3 Leon 32.

5 See note 3 supra.

6 See the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 36.

7 Ibid s 149(3); and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 106, 541-542.



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**246. Effect of specifying parcels in habendum.**

It has been laid down that the parcels must be defined in the premises, and that the mention of lands in the habendum, which have not been expressly or impliedly mentioned in the premises, is of no effect<sup>1</sup>; but any such rule is subject to the general principle that the deed must be construed as a whole, and it is believed that at the present day the mention of lands in the habendum instead of in the premises would not invalidate the grant<sup>2</sup>. Where the parcels have been defined in the premises, it is wrong to repeat them specifically in the habendum, unless for the purpose of expressing different limitations as to different parcels<sup>3</sup>.

1 'Nothing shall pass in the habendum if it be not spoken of in the grant, except it be a thing appendant or appurtenant: *Abbess Sion's Case* (1460), cited in *Throckmerton v Tracy* (1555) 1 Plowd 145 at 152; *Shep Touch* 75-76; and see also *Gregg v Richards* [1926] Ch 521, CA.

2 That is, where no property is mentioned in the premises. If the premises and the habendum are at variance, however, the case is different, and prima facie only the property mentioned in the premises would pass. This is the case put in *Shep Touch* 76: 'If a man grant Blackacre only in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed'. A right may pass under 'appurtenances' in the habendum, although not named in the premises: *Renvick v Daly* (1877) IR 11 CL 126.

3 Eg habendum, part for 20 years and other part for ten years: *Carew's Case* (1586) Moore KB 222 at 223.

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## **(10) COVENANTS**

### **(i) What Constitutes a Covenant**

#### **247. Definition and construction of covenant.**

A covenant is an agreement contained in a deed<sup>1</sup> whereby the parties, or some or one of them, are or is bound to do or not to do a specified thing, as covenants in a lease by deed to pay rent or not to carry on certain trades; or whereby they undertake that a certain state of affairs exists, as a covenant in a conveyance that the grantor is entitled or that he has not incumbered<sup>2</sup>. The word will, however, be construed to cover stipulations in an agreement under hand if otherwise it would have no effect, as where a document refers to the 'covenants' contained in a lease which is not by deed<sup>3</sup>. The words of a covenant are to be taken most strongly against the covenantor; but this must be qualified by the observation that due regard must be paid to the intentions of the parties as collected from the whole context of the instrument<sup>4</sup>.

1 Much of the matter contained in these paragraphs applies also to agreements under hand. As to illegal covenants see CONTRACT vol 9(1) (Reissue) PARA 836 et seq. As to covenants to pay amounts in, or including, shillings and old pence see PARA 171 ante.

2 See *Randall v Lynch* (1810) 12 East 179 at 182; *Russell v Watts* (1885) 10 App Cas 590 at 611, HL. Where in a deed the parties agreed 'by way of declaration and not of covenant', these words were rejected as 'nonsense': *Ellison v Bignold* (1821) 2 Jac & W 503 at 510.

3 See *Hayne v Cummings* (1864) 16 CBNS 421 at 426; *Brookes v Drysdale* (1877) 3 CPD 52. See also *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC, where special conditions in a Crown grant were construed as covenants.

4 *Browning v Wright* (1799) 2 Bos & P 13 at 22 per Lord Eldon CJ; and see PARA 175 et seq ante.

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**248. Person bound by covenant.**

Where a deed, purporting to bind various parties, provides that some one of the parties is to do an act or make a payment, this stipulation is a covenant by that party with the others<sup>1</sup>; and similarly, an agreement of all parties that property is to be dealt with in a particular way is a covenant by those parties whose concurrence is required to give effect to the provisions in favour of those who are to take the benefit of the conveyance<sup>2</sup>.

<sup>1</sup> *Dawes v Tredwell* (1881) 18 ChD 354 at 359, CA, per Jessel MR; and see *Ramsden v Smith* (1854) 2 Drew 298 at 307-308.

<sup>2</sup> *Willoughby v Middleton* (1862) 2 John & H 344 at 354 per Wood V-C.

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#### **249. How a covenant is made.**

No particular technical words are necessary for the making of a covenant<sup>1</sup>. Any words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicate an agreement constitute, when contained in an instrument executed as a deed, a covenant<sup>2</sup>. It must, however, be clear that the words are intended to operate as an agreement<sup>3</sup>, and not merely as words of condition or qualification<sup>4</sup>. Express words of agreement, such as 'covenant', 'agree'<sup>5</sup>, or 'engage'<sup>6</sup>, may be used; but, without such words, an agreement may be collected from the entire instrument, and a covenant when so made out by construction, sometimes called an implied covenant, is for all purposes an express covenant, and is as effectual as if the word 'covenant' had been used<sup>7</sup>. A specific covenant as to one matter may, however, prevent a covenant being implied as to a cognate matter<sup>8</sup>.

1 *Lant v Norris* (1757) 1 Burr 287 at 290 per Lord Mansfield CJ; *Shep Touch* 162; *Sampson v Easterby* (1829) 9 B & C 505 at 512 (affd (1830) 6 Bing 644 Ex Ch); *Wolveridge v Steward* (1833) 1 Cr & M 644 at 657, Ex Ch; *Rigby v Great Western Rly Co* (1845) 14 M & W 811 at 815 per Parke B; *Rashleigh v South Eastern Rly Co* (1851) 10 CB 612 at 632 per Maule J; *Russell v Watts* (1885) 10 App Cas 590 at 611, HL, per Lord Blackburn; *Re Cadogan and Hans Place Estate Ltd, ex p Willis* (1895) 73 LT 387, CA.

2 See *Russell v Watts* (1885) 10 App Cas 590, HL; *Rashleigh v South Eastern Rly Co* (1851) 10 CB 612 at 632; *James v Cochrane* (1852) 7 Exch 170 at 177 per Parke B (on appeal (1853) 8 Exch 556); *Knight v Gravesend and Milton Waterworks Co* (1857) 2 H & N 6 at 11. See *Hill v Carr* (1676) 1 Cas in Ch 294 ('wherever the intent of the parties can be collected out of a deed for the doing or not doing a thing, covenant will lie'); and see also *Brice v Carre and Emerson* (1661) 1 Lev 47.

3 *Courtney v Taylor* (1843) 6 Man & G 851 at 867 per Tindal CJ; *Iven v Elwes* (1854) 3 Drew 25 at 34 per Kinderesley V-C. A statement in a deed of a binding intention to create restrictive covenants on the part of vendors who execute the deed, made as an inducement to purchasers, is as effective as a formal covenant: *Mackenzie v Childer* (1889) 43 ChD 265 at 275.

4 *Wolveridge v Steward* (1833) 1 Cr & M 644 at 657, Ex Ch, per Lord Denman CJ; Com Dig, Covenant (A 3); and see PARAS 252, 257 post.

5 The word 'covenant' is not more powerful than the word 'agree': *Monypenny v Monypenny* (1861) 9 HL Cas 114 at 137 per Lord St Leonards. To create a covenant in a deed the word 'covenant' need not be specifically used: *Saltoun v Houstoun* (1824) 1 Bing 433.

6 *Rigby v Great Western Rly Co* (1845) 14 M & W 811 at 816 per Parke B.

7 *Shep Touch* 162; *Williams v Burrell* (1845) 1 CB 402 at 431 per Tindal CJ ('the legal effect and operation of the covenant, whether framed in express terms, that is whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant in this sense of the term differs nothing in its operation and legal consequences from an express covenant'); see also *Duke of St Albans v Ellis* (1812) 16 East 352 at 355 per Lord Ellenborough CJ; *Brookes v Drysdale* (1877) 3 CPD 52 at 57-58 per Grove J.

8 *Sharp v Waterhouse* (1857) 7 E & B 816 at 827.

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## (ii) Covenants arising by Construction

### 250. In what circumstances covenant is implied.

A covenant will arise by construction where the instrument shows an intention that the party is to be bound, although it contains no express words of obligation, for it is a general rule of construction that terms of a written instrument which import that the parties have agreed upon certain things being done have the same effect as express promises, or, in the case of a deed, covenants by the respective parties to do all such things as are necessary to carry out the agreement according to the expressed or manifest intention<sup>1</sup>. However, a covenant will not be implied unless the implication is so necessary that the court can have no doubt what covenant or undertaking to write into the agreement<sup>2</sup>.

It is immaterial whether the words importing the covenant are contained in the recitals or in the operative part of the instrument<sup>3</sup> and it is sufficient if the intention of the parties mutually to contract appears from the instrument as a whole<sup>4</sup>. A recital of agreement will not, however, import a covenant where there is an express covenant relating to the same subject matter<sup>5</sup>, unless the express covenant is so ambiguous as to justify a reference to the recitals in order to explain it<sup>6</sup>. Whether a recital or acknowledgment operates as a covenant is a question of construction in each particular case, and depends on what appears to have been the intention of the parties having regard to the terms of the instrument as a whole and the surrounding circumstances<sup>7</sup>.

1 See *Wood v Copper Miners' in England Co* (1849) 7 CB 906 at 936 per Wilde CJ (an agreement between A and B that A shall buy certain property from B imports an undertaking by B to sell the property to A); *Duke of St Albans v Ellis* (1812) 16 East 352 (covenant in lease to plough and cultivate all the premises, except the rabbit warren and sheep walk in a due course of husbandry, imports a covenant not to plough the rabbit warren or sheep walk); *Williams v Burrell* (1845) 1 CB 402 (provision in a lease that the lessor should during the term warrant and defend the lessee against all persons lawfully claiming the premises held equivalent to an express covenant for quiet enjoyment); *Payne v Haine* (1847) 16 M & W 541 (a covenant by a lessee to keep premises in good repair during the term imports a covenant to put them in good repair if they are in bad repair at the commencement of the term); *M'Intyre v Belcher* (1863) 14 CBNS 654 (a promise by the purchaser of the goodwill of a business in consideration of the transfer to pay a certain proportion of the earnings for a specified period imports a promise to carry on the business during such period and not by any wilful act or default to prevent the receipt of earnings); *Telegraph Dispatch and Intelligence Co v McLean* (1873) 8 Ch App 658 (similar case); *Saner v Bilton* (1878) 7 ChD 815 (the same rule applies where the covenant is by the lessor); *Turner v Goldsmith* [1891] 1 QB 544, CA (agreement to employ a person as agent for a specified term for the sale of goods to be submitted to him by samples from time to time, held to import an obligation to submit samples so as to enable the agent to earn his commission); *Ogdens Ltd v Nelson* [1905] AC 109, HL (agreement to give bonus to customers for a certain period varying with the profits of a business imports a promise to continue the business so that the amount of the bonus can be ascertained). See also *Emmens v Elderton* (1853) 4 HL Cas 624; *Devonald v Rosser & Sons* [1906] 2 KB 728, CA; *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA; and cf *Webb v Plummer* (1819) 2 B & Ald 746 (a provision in a lease that the tenant should during the term fold his flock of sheep which he should keep on the premises held to import a covenant to keep a flock of sheep on the premises); *Earl of Shrewsbury v Gould* (1819) 2 B & Ald 487 (covenant by lessee at all times and seasons of burning lime to supply the lessor and his tenants with lime at a stipulated price for the improvement of his and their lands, etc, held to import a covenant to burn lime at all such seasons); *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA; *Morell v New London Discount Co Ltd* (1902) 18 TLR 507; *Moon v Camberwell Borough Council* (1903) 68 JP 57, CA; *Bovine Ltd v Dent and Wilkinson* (1904) 21 TLR 82; *A-G v City of Dublin Steam Packet Co* (1909) 25 TLR 696, HL (contract for the carriage of mails held to import an obligation on the Crown to allow such facilities as were reasonably necessary to enable the contractors to perform their obligations under the contract).

2 *R v Paddington and St Marylebone Rent Tribunal, ex p Bedrock Investments Ltd*[1947] KB 984 at 990, [1947] 2 All ER 15 at 17, DC, per Lord Goddard CJ (affd on other grounds [1948] 2 KB 413, [1948] 2 All ER 528, CA); *R v Croydon and District Rent Tribunal, ex p Langford Property Co Ltd*[1948] 1 KB 60, DC; *Penn v Gatenex Co Ltd*[1958] 2 QB 210 at 224, [1958] 1 All ER 712 at 718, CA, per Parker LJ. As to the general law relating to implications see PARAS 181-184 ante.

3 *Farrall v Hilditch* (1859) 5 CBNS 840; *Lay v Mottram* (1865) 19 CBNS 479; *Brooks v Jennings*(1866) LR 1 CP 476 (a recital in a composition deed that the debtor has agreed to pay a certain composition on his debts was held equivalent to a covenant with each of the creditors to pay such composition).

4 *Wood v Copper Miners' in England Co* (1849) 7 CB 906.

5 *Dawes v Tredwell*(1881) 18 ChD 354, CA (recital in marriage settlement of agreement to settle after-acquired property of either husband or wife; covenant by husband alone that if property should be acquired by either he would settle; it was held that no covenant by the wife was implied to settle property acquired by her for her separate use).

6 *Re De Ros' Trust, Hardwicke v Wilmot*(1885) 31 ChD 81 (marriage settlement containing recital of agreement to settle after-acquired property of either spouse; covenant by husband, that he and the wife would settle, executed by both; held sufficiently ambiguous to justify a reference to the recitals, and that the wife's property was bound by the covenant).

7 *Courtney v Taylor* (1843) 6 Man & G 851; *Farrall v Hilditch* (1859) 5 CBNS 840.

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## 251. Specific cases of implication of covenants.

If in an instrument executed as a deed by two persons one agrees to pay a specified sum for the other's land, this implies a covenant<sup>1</sup> by the latter to convey<sup>2</sup>; an agreement in a charterparty that 40 days are to be allowed for unloading and reloading implies a covenant not to detain the ship for a longer period<sup>3</sup>. An agreement by deed to execute a deed which would contain a covenant to pay money creates a specialty debt<sup>4</sup>. An assignment of property, such as an interest in a medicine, may raise an implied covenant by the vendor not to prepare and sell the medicine, on the principle that he must not derogate from his grant<sup>5</sup>; and a conveyance with a restriction against carrying on certain trades will imply a corresponding covenant<sup>6</sup>. On the other hand a clause in a settlement indemnifying trustees in respect of moneys which they do not receive does not imply a covenant by them to account for moneys which they do receive<sup>7</sup>; and an express covenant of indemnity against a mortgage debt given on the purchase of an equity of redemption will exclude the covenant which would otherwise be implied<sup>8</sup>. Where there is a covenant to build specifying the time and mode of building, no further covenant to build can be implied from a covenant to repair<sup>9</sup>; but where it is known that a building has been extensively damaged before a licence to assign the lease is granted and one of the covenants in the licence is to make good and repair within a certain time, a proviso that the covenant is only operative if planning permission can be obtained will be implied<sup>10</sup>. A grant of an exclusive right of burial in a cemetery plot does not imply an obligation to maintain the safety of a tree on the plot<sup>11</sup>.

Where an instrument creating a trust contains a declaration of trust, and the trustee executes it, this operates as a covenant by him<sup>12</sup>; though it will not be so if the trustee does not execute the deed, but only acts under it<sup>13</sup>, or where the deed, though executed by the trustee, contains only an acceptance by him of the trust<sup>14</sup>.

The implication of terms in contracts where it is clear that the parties must have intended the term to be implied or where implication is necessary to give efficacy to the transaction is discussed elsewhere in this work<sup>15</sup>.

1 See the cases cited in para 250 notes 1, 3 ante; and see also PARAS 252-254 post.

2 *Pordage v Cole* (1669) 1 Wms Saund 319 1; and cf *Wood v Copper Miners' in England Co* (1849) 7 CB 906 (where, upon a covenant by a lessee to take coals, there was implied a covenant by the lessor to supply them); *Great Northern Ry Co v Harrison* (1852) 12 CB 576, Ex Ch (contract by one party to supply and by other party to take sleepers as the engineer should call for them).

3 *Randall v Lynch* (1810) 12 East 179.

4 See *Saunders v Milsome* (1866) LR 2 Eq 573; *Kidd v Boone* (1871) LR 12 Eq 89.

5 *Seddon v Senate* (1810) 13 East 63; and cf *Gerard v Lewis* (1867) LR 2 CP 305; *Trego v Hunt* [1896] AC 7, HL. Where partners have assigned all their partnership property, a partner in whom any such property is solely vested impliedly covenants to do what is necessary to transfer it to the assignee but not to pay to the assignee money which he owes to the partnership: *Aulton v Atkins* (1856) 18 CB 249. As to assignments operating by way of covenant see *Deering v Farrington* (1674) 1 Mod Rep 113; *Caister Parish v Eccles Parish* (1701) 1 Ld Raym 683 per Holt CJ.

6 *Hodson v Coppard* (1860) 29 Beav 4.

7 *Bartlett v Hodgson* (1785) 1 Term Rep 42.

8 *Mills v United Counties Bank Ltd* [1912] 1 Ch 231, CA; and cf *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388, CA.

9 *Stephens v Junior Army and Navy Stores Ltd* [1914] 2 Ch 516, CA, disapproving dictum of Stirling J in *Jacob v Down* [1900] 2 Ch 156. For the application of the maxim 'expressum facit cessare tacitum' see PARA 182 ante. See also *Morell v New London Discount Co* (1902) 18 TLR 507 (agreement that plaintiffs should contribute towards cost of theatre intended to be built by defendants and should become managing directors; no implied obligation on defendants to build theatre).

10 *Sturcke v SW Edwards Ltd* (1971) 23 P & CR 185.

11 *London Cemetery Co v Cundey* [1953] 2 All ER 257, [1953] 1 WLR 786.

12 *Benson v Benson* (1710) 1 P Wms 130; *Mavor v Davenport* (1828) 2 Sim 227; *Turner v Wardle* (1834) 7 Sim 80; *Wood v Hardisty* (1846) 2 Coll 542. A breach of trust constitutes in general only a simple contract debt: *Vernon v Vawdry* (1740) 2 Atk 119.

13 *Richardson v Jenkins* (1853) 1 Drew 477.

14 *Adey v Arnold* (1852) 2 De GM & G 432; *Holland v Holland* (1869) 4 Ch App 449; and cf *Isaacson v Harwood* (1868) 3 Ch App 225.

15 See CONTRACT vol 9(1) (Reissue) PARA 778 et seq.



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## 252. Provisos and participial phrases.

A grant or a covenant may be followed by words contemplating that one of the parties is to do or abstain from doing some act. Such words are commonly introduced by 'provided that', or 'to be', or they are contained in a participial clause<sup>1</sup>; and they may operate as a condition for, or qualification of, the preceding covenant, or as a separate covenant. For them to operate as a covenant it must appear that the act or abstention is intended to be obligatory. The words 'provided' or 'on condition' may have this effect<sup>2</sup>; and when a covenant by a lessee to repair is followed by 'provided always and it is agreed' that the lessor shall find timber or other materials, these words create a covenant by the lessor<sup>3</sup>. On the other hand if a lessee's covenant to repair is followed by a proviso that the lessor shall find timber, without 'agreed', or by such words as 'the lessor first allowing timber', or 'the premises being previously put in repair by the lessor', there will in general be only a qualification of the lessee's covenant<sup>4</sup>.

Where, however, the words express the consideration for the previous covenant or grant, or the condition upon which permission or liberty to do an act is conferred, they will usually be obligatory and will make a covenant, as where one person covenants to pay money to another, the latter 'making him an estate' in certain lands<sup>5</sup>; or where a lease is made, the lessee 'yielding and paying' rent<sup>6</sup>, or 'rendering' rent clear of taxes<sup>7</sup>, or 'doing suit' to the lessor's mill<sup>8</sup>; or, where in a lease trees are reserved to the lessor with liberty to fell them, 'repairing the hedges where they grow'<sup>9</sup>. By similar words a negative covenant may be created. Thus permission to a person to cut down wood for repairs 'without making waste' implies a covenant by him not to commit waste<sup>10</sup>; and a covenant by a lessee to plough and cultivate the demised premises 'except the rabbit warren and sheep walk' implies a covenant not to plough up the excepted part<sup>11</sup>.

1 *Westacott v Hahn* [1918] 1 KB 495 at 505, 513, CA.

2 Com Dig, Covenant (A 2); Shep Touch 162; *Brookes v Drysdale* (1877) 3 CPD 52 at 58; and see *Ashton v Stock* (1877) 6 ChD 719.

3 *Brookes v Drysdale* (1877) 3 CPD 52; and see *Ashton v Stock* (1877) 6 ChD 719.

4 *Holder v Tayloe* (1615) 1 Roll Abr 518; *Lord Cromwel's Case* (1601) 2 Co Rep 69b at 72a, n (1); Bac Abr, Covenant (A) note; *Thomas v Cadwallader* (1744) Willes 496; and see Shep Touch 122; Co Litt 203b. However, in *Mucklestone v Thomas* (1739) Willes 146, 'slates being found, allowed, and delivered on the premises' by the lessor implied a covenant by him; and similarly in *Cannock v Jones* (1849) 3 Exch 233, where a lessee covenanted to repair windows and hedges, the premises 'being previously put in repair and kept in repair by' the lessor, the latter words were held to amount to an absolute and independent covenant by the lessor to put the premises in repair. As to such words being a condition precedent see *Neale v Ratcliff* (1850) 15 QB 916; and see PARA 269 post.

5 *Large v Cheshire* (1671) 1 Vent 147; and cf *Boone v Eyre* (1779) 2 Wm Bl 1312.

6 *Porter v Swetnam* (1654) Sty 406 at 407; *Hellier v Casbard* (1665) 1 Sid 240 at 266; *Webb v Russell* (1789) 3 Term Rep 393 at 402; *Iggulden v May* (1804) 9 Ves 325 at 330; *Vyvyan v Arthur* (1823) 1 B & C 410; and see Platt on Covenants 50.

7 *Giles v Hooper* (1690) Carth 135.

8 *Vyvyan v Arthur* (1823) 1 B & C 410.

9 This is a covenant by the lessor: *Warren v Arthur* (1682) 2 Mod Rep 317.

- 10 *Stevinson's Case* (1589) 1 Leon 324.
- 11 *Duke of St Albans v Ellis* (1812) 16 East 352.

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### **253. Implied covenant to do preliminary act.**

Where the terms of an agreement show that the parties contemplated that a certain thing would be done, as to which there is no express covenant, before another thing is done, as to which there is an express covenant, it must be considered whether the agreement can be read as comprising a covenant to do the former. If the two things are so involved that the parties cannot be supposed to have intended to impose an obligation to do one without imposing also an obligation to do the other, then there is, by construction, a covenant to do the first thing<sup>1</sup>; but otherwise it is not to be assumed that the parties intended to bind themselves to do the first thing because they entered into the contract in the expectation that it would be done, treating it as a thing certain to take place and providing only for the event of its taking place. In such a case there will usually be no covenant implied to do the first thing, but if it is not done, then the express covenant to do the other thing does not become operative<sup>2</sup>.

1 Thus a covenant by a lessee to fold a flock of sheep in the usual places involves a covenant to keep a flock (*Webb v Plummer* (1819) 2 B & Ald 746); and a covenant by a lessee to supply lime to the lessor at all times of burning implies a covenant to burn lime (*Earl of Shrewsbury v Gould* (1819) 2 B & Ald 487).

2 See *Rashleigh v South Eastern Rly Co* (1851) 10 CB 612 (on appeal (1852) 16 Jur 567n, Ex Ch); but as to this case see *Knight v Gravesend and Milton Waterworks Co* (1857) 2 H & N 6. See, in a mining lease, as to sinking pits *James v Cochrane* (1852) 7 Exch 170 (on appeal (1853) 8 Exch 556, Ex Ch). As to obtaining a necessary consent see *Smith v Harwich Corp* (1857) 2 CBNS 651.

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## **254. Implied covenant for continuance of business etc.**

Where an arrangement is entered into which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on the part of the party upon whom this continuance depends that he will do nothing of his own motion to put an end to the state of circumstances in question<sup>1</sup>. Thus where a business is sold in consideration of the vendor receiving a share of the profits for a specified time, there is an implied agreement by the purchaser to carry it on for that time<sup>2</sup>. In general, however, although the effective operation of an agreement may depend upon the continuance of a business (as in the case of a contract to supply all of certain goods produced in a specified period<sup>3</sup>) or of other existing circumstances (as in the keeping up of a patent<sup>4</sup>), there is no obligation to maintain the existing state<sup>5</sup>.

A contract to employ and pay specified wages for a fixed period does not bind the employer to carry on the business<sup>6</sup>, or to provide work<sup>7</sup>, but only to pay the wages if the employee is willing to work<sup>8</sup>. The special circumstances of the engagement may, however, imply a covenant that the employee is to be actually employed<sup>9</sup>.

However, an employee is entitled to a minimum period of notice<sup>10</sup> and to be provided with a written statement of reasons for dismissal<sup>11</sup>. An employer may in appropriate circumstances be required to make a redundancy payment<sup>12</sup>.

1 *Stirling v Maitland* (1864) 5 B & S 840 at 852 per Cockburn CJ.

2 *M'Intyre v Belcher* (1863) 14 CBNS 654; *Telegraph Dispatch and Intelligence Co v McLean* (1873) 8 Ch App 658; *Hope v Gibbs* (1877) 47 LJ Ch 82; and see *Ogdens Ltd v Nelson* [1905] AC 109, HL.

3 *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, CA.

4 'The safest rule to follow in such cases, when there is any reasonable doubt whether the parties did intend to enter into a covenant such as is sought to be implied here, is to look at the deed and at the circumstances under which the deed was made; and if you find that there is no such covenant in the deed, and that there has been no bad faith on the part of those against whom it is sought to imply such a covenant, the court ought to be extremely careful how it implies such a covenant in a well considered deed, where there are no words whatever which express that covenant in any way': *Re Railway and Electric Appliances Co* (1888) 38 ChD 597 at 608 per Kay J. A deed is to be more carefully construed than a preliminary agreement: see *Re Railway and Electric Appliances Co* supra at 605 per Kay J; and *Churchward v R* (1865) LR 1 QB 173 at 195 per Cockburn CJ.

5 Thus, on an employment of an agent at a commission for a fixed time, there is no implied agreement that the business is to continue to be carried on (*Re English and Scottish Marine Insurance Co, ex p Maclure* (1870) 5 Ch App 737, CA; *Rhodes v Forwood* (1876) 1 App Cas 256, HL; *Northey v Trevillion* (1902) 18 TLR 648; *Lazarus v Cairn Line of Steamships Ltd* (1912) 106 LT 378), unless there is an express contract to employ the agent as well as to pay the commission (*Turner v Goldsmith* [1891] 1 QB 544, CA). Cf *Beswick v Swindells* (1835) 3 Ad & El 868, Ex Ch, where there was a contract to make a payment if the business was then carried on; and see *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, CA. See also AGENCY vol 1 (2008) PARA 183; CONTRACT vol 9(1) (Reissue) PARA 778 et seq.

6 *Aspdin v Austin* (1844) 5 QB 671; *Dunn v Sayles* (1844) 5 QB 685.

7 *Turner v Sawdon & Co* [1901] 2 KB 653, CA.

8 *Turner v Sawdon & Co* [1901] 2 KB 653, CA; and see *Churchward v R* (1865) LR 1 QB 173. See also *King v Accumulative Life Fund and General Assurance Co* (1857) 3 CBNS 151; *Emmens v Elderton* (1853) 4 HL Cas 624.

9 Thus, if there is an agreement that a musical director of a theatre is to be advertised as such, he must actually fill the post in order to make the advertisements true, and consequently he is entitled to be employed: *Bunning v Lyric Theatre Ltd* (1894) 71 LT 396.

10 See the Employment Rights Act 1996 s 86 (as amended); and EMPLOYMENT vol 40 (2009) PARAS 692-693.

11 See *ibid* s 92 (as amended); and EMPLOYMENT vol 40 (2009) PARA 712.

12 See *ibid* s 135; and EMPLOYMENT vol 40 (2009) PARA 790 et seq.

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### (iii) Covenants in Law

#### 255. Covenants implied from word demise.

A covenant in law is an agreement which the law implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate which by those words has been already created<sup>1</sup>.

Thus, upon a lease by deed using the word 'demise' there are implied covenants for title<sup>2</sup> and for quiet enjoyment<sup>3</sup>. The latter covenant is limited in duration to the interest of the lessor<sup>4</sup>, but extends to the acts of persons claiming by title paramount to him<sup>5</sup>. The covenant is implied only against the person actually demising, not against one who joins to confirm<sup>6</sup>. Where several demise jointly, the covenant for title is joint but the covenant for quiet enjoyment is several, so that any lessor can be sued alone for disturbance caused by himself<sup>7</sup>. The implication of these covenants will be prevented by the existence of express covenants<sup>8</sup>.

1 *Williams v Burrell* (1845) 1 CB 402 at 429.

2 That is, that the lessor has power to let (*Holder v Taylor* (1614) Hob 12; *Burnett v Lynch* (1826) 5 B & C 589 at 609; cf *Kean v Strong* (1845) 9 ILR 74 at 82 (on appeal sub nom *Strong v Kean* (1847) 10 ILR 137)); but this need not be power to grant the term mentioned in the lease; it is sufficient that the lessor is entitled to put the lessee into possession, otherwise this covenant would go beyond the implied covenant for quiet enjoyment, which is restricted to the interest of the lessor (*Adams v Gibney* (1830) 6 Bing 656; *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA; and see *Bragg v Wiseman* (1614) 1 Brownl 22, put upon the ground that a covenant in law must not be extended to make a man do more than he can). It is perhaps more correct to say that only one covenant is implied of which either want of title or an eviction would be a breach: *Line v Stephenson* (1838) 5 Bing NC 183 at 184, Ex Ch, per Alderson B; *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA. See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 511.

3 *Line v Stephenson* (1838) 5 Bing NC 183, Ex Ch; *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA. An implied contract for quiet enjoyment arises also upon an agreement for letting, out of the mere relation of landlord and tenant, without any use of the word 'demise' (*Hart v Windsor* (1844) 12 M & W 68 at 85; *Bandy v Cartwright* (1853) 8 Exch 913; *Hall v City of London Brewery Co* (1862) 2 B & S 737; *Mostyn v West Mostyn Coal and Iron Co* (1876) 1 CPD 145; *Robinson v Kilvert* (1889) 41 ChD 88 at 96, CA; *Budd-Scott v Daniell* [1902] 2 KB 351; *Markham v Paget* [1908] 1 Ch 697); although the contract so implied from a mere letting is restricted to the acts of the lessor and those claiming under him (*Jones v Lavington* [1903] 1 KB 253, CA), and is limited to the interest of the lessor (*Penfold v Abbott* (1862) 32 LJQB 67; *Baynes & Co v Lloyd & Sons* supra).

4 See note 2 supra.

5 *Line v Stephenson* (1838) 5 Bing NC 183 at 184-185, Ex Ch.

6 *Smith v Pocklington* (1831) 1 Cr & J 445.

7 *Coleman v Sherwin* (1689) 1 Salk 137.

8 *Stannard v Forbes* (1837) 6 Ad & El 572; *Line v Stephenson* (1838) 5 Bing NC 183, Ex Ch; *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA.

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## **256. Conveyancing: covenants and words implied.**

In deeds executed after 1 October 1845, the words 'give' or 'grant' do not imply any covenant in law, save where otherwise provided by statute<sup>1</sup>.

Certain covenants are implied by the Law of Property (Miscellaneous Provisions) Act 1994<sup>2</sup> in an instrument<sup>3</sup> effecting or purporting to effect a disposition of property<sup>4</sup>, whether or not the disposition is for valuable consideration<sup>5</sup>. A distinction is made between the case where a disposition is expressed to be made with full title guarantee<sup>6</sup>, and the case where it is made with limited title guarantee<sup>7</sup>. Liability under certain covenants is excluded in certain cases<sup>8</sup>, and the operation of any covenant implied in an instrument by virtue of the provisions relating to implied covenants for title<sup>9</sup> may be limited or extended by a term of that instrument<sup>10</sup>.

A covenant relating to land of the covenantee, made after 1925<sup>11</sup>, is deemed to be made with the covenantee and his successors in title as if those successors were mentioned<sup>12</sup>; and a covenant<sup>13</sup> relating to land of a covenantor or capable of being bound by him is, if made after 1925 and unless a contrary intention is expressed<sup>14</sup>, deemed to be made by a covenantor on behalf of himself and his successors in title and the persons deriving title under him or them as if those successors and other persons were mentioned<sup>15</sup>.

A covenant and a bond and an obligation or contract made under seal after 31 December 1881 but before 31 July 1990<sup>16</sup>, or executed as a deed<sup>17</sup>, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation or contract<sup>18</sup>. This applies to a covenant implied by virtue of the Law of Property Act 1925<sup>19</sup>.

In the construction of a covenant or proviso or other provision implied in a deed or assent by virtue of that Act, words importing the singular or plural number or the masculine gender are read as also importing the plural or singular number or extending to females as the case may require<sup>20</sup>.

1 Law of Property Act 1925 s 59(2) (reproducing the Real Property Act 1845 s 4 (repealed)); and see 1 Dart's Vendors and Purchases (8th Edn) 508. Formerly the words 'give' or 'grant' in a deed did operate as a warranty of title: see *Williams v Burrell* (1845) 1 CB 402; Co Litt 384a, n (1). For an instance where covenants are imported from the word 'grant' see the Lands Clauses Consolidation Act 1845 s 132; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 906. In this instance the terms of the covenants to be implied are set out in the statute.

2 See generally the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended); and SALE OF LAND vol 42 (Reissue) PARAS 337, 350-351. As to covenants implied in conveyances made before 1 July 1995 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (as originally enacted) came into force) see the Law of Property Act 1925 Sch 2 Pts I-VI (Pts II-III as amended, Pt VI repealed). As to conveyance subject to rents see s 77 (as amended), Sch 2 Pts VII-VIII. See MORTGAGE vol 77 (2010) PARA 223; SALE OF LAND vol 42 (Reissue) PARA 338 et seq.

3 For the meaning of 'instrument' see SALE OF LAND vol 42 (Reissue) PARA 350.

4 For the meaning of 'property' see SALE OF LAND vol 42 (Reissue) PARA 350.

5 See the Law of Property (Miscellaneous Provisions) Act 1994 s 1(1).

6 Ie in this case *ibid* ss 2, 3(1), (2), 4, 5 (as amended) apply: see s 1(2)(a).

7 Ie in this case *ibid* ss 2, 3(3), 4, 5 (as amended) apply: see s 1(2)(b).

8 See *ibid* s 6 (as amended); and SALE OF LAND vol 42 (Reissue) PARA 350.

9 *Ie* *ibid* Pt I (as amended): see s 8(1).

10 *Ibid* s 8(1); and see SALE OF LAND vol 42 (Reissue) PARAS 350-351.

11 The Conveyancing Act 1881 s 58 (repealed), however, applies substantially the same law to covenants made after 1881, and its effect is saved as regards covenants made before 1926.

12 Law of Property Act 1925 s 78. As to the possible far-reaching effects of the change in wording of s 78 when compared with the preceding enactment (*ie* the Conveyancing Act 1881 s 58 (repealed)): see note 11 *supra*) see *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; *Williams v Unit Construction Co Ltd* (1955) 19 Conv (NS) 262, CA. As regards restrictive covenants see EQUITY vol 16(2) (Reissue) PARA 613 *et seq*.

13 This includes a covenant to do an act relating to the land, although the subject matter may not be in existence when the covenant is made: see the Law of Property Act 1925 s 79(1). For the second rule in *Spencer's Case* (1583) 5 Co Rep 16a, whereby a covenant concerning land but relating to a thing in futuro, *eg* a covenant to erect new buildings, did not bind assigns unless assigns were expressly mentioned see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 559.

14 Compare *Re Robert Stephenson & Co Ltd, Poole v Robert Stephenson & Co Ltd* [1915] 1 Ch 802 (assigns of lessees not expressed but covenant binding on lessees' assigns); and see also *Re Royal Victoria Pavilion, Ramsgate, Whelan v FTS (Great Britain) Ltd* [1961] Ch 581, [1961] 3 All ER 83.

15 See the Law of Property Act 1925 s 79. As regards restrictive covenants see EQUITY vol 16(2) (Reissue) PARA 613 *et seq*. As to further provisions relating to covenants running with land see the Law of Property Act 1925 ss 80(2), (4), 141, 142; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 567, 571 *et seq*.

16 *Ie* the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 *ante*. As from 31 July 1990, any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished: see s 1(1)(b); and PARAS 7, 27, 32 *ante*. As to the application of s 1(1)(b) see s 1(9); and PARA 7 text and note 4 *ante*.

17 *Ie* in accordance with *ibid* s 1 (as amended) after its coming into force (see the text to note 16 *supra*): see the Law of Property Act 1925 s 80(1) (as amended: see note 18 *infra*).

18 *Ibid* s 80(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1989 s 1, Sch 1 paras 1, 4); and see *Kirk v Eustace* [1937] AC 491, [1937] 2 All ER 715, HL; *Langstone v Hayes* [1946] KB 109, [1946] 1 All ER 114, CA; and PARA 109 *ante*.

19 Law of Property Act 1925 s 80(1).

20 *Ibid* s 83; and *cf* para 171 *ante*.



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#### **(iv) Qualified Covenants**

##### **257. Conditional covenants.**

A covenant may be absolute or qualified, and in the latter case the qualification may be introduced either by way of condition or by way of limitation. A qualification by way of condition is introduced by such words as 'on condition that' or 'provided that', or is expressed in a participial clause<sup>1</sup>, and it may take effect by way of condition precedent or condition subsequent. If it is a condition precedent, it must be satisfied before the liability on the covenant can arise<sup>2</sup>; if it is a condition subsequent, then, upon performance of the condition, the liability under the covenant ceases<sup>3</sup>. A qualification which is repugnant to the rest of the covenant will be rejected<sup>4</sup>.

1 See PARA 252 ante. As to the qualification implied in 'provided always' see *Martelli v Holloway*(1872) LR 5 HL 532.

2 Thus in a covenant by a lessee to repair provided that the lessor finds timber, the proviso is a condition precedent (see the cases referred to in para 252 note 4 ante). Such a condition may also be a cross-covenant (Bac Abr, Covenant (A) 340n). The performance by a lessee of his covenants is, in general, a condition precedent to the lessor's liability under a covenant to renew: see *Bastin v Bidwell*(1881) 18 ChD 238; and Bac Abr, Conditions. As to covenants which are also conditions see PARA 266 post.

3 A clause providing for cesser of an agent's liability under a charter party on the goods being shipped operates as a condition subsequent: *Bannister v Breslau*(1867) LR 2 CP 497. The condition of a bond is technically a condition subsequent, though in substance the liability on the bond is conditional on breach of the condition: see PARA 91 ante. In a covenant not to assign without consent, with a proviso that consent is not to be unreasonably withheld, the proviso is a qualification of the covenant and operates by way of condition subsequent. Such a proviso is now implied by statute, notwithstanding any express provision to the contrary: see the Landlord and Tenant Act 1927 s 19(1)(a), (1A)-(1E) (as added); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 486. If, upon request for consent, it is unreasonably withheld, then the liability under the covenant for that occasion ceases, and the lessee can assign without consent: *Treloar v Bigge*(1874) LR 9 Exch 151; *Sear v House Property and Investment Society*(1880) 16 ChD 387; *Young v Ashley Gardens Properties Ltd*[1903] 2 Ch 112, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 471, 487, 493. As to conditional promises see also CONTRACT vol 9(1) (Reissue) PARA 670.

4 *Belcher v Sikes* (1828) 8 B & C 185.

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## 258. Limited covenants.

A covenant is qualified by way of limitation when words are introduced into it which limit in some respect the liability of the covenantor, and this is the more usual use of the term 'qualified covenant'<sup>1</sup>. The limitation will be effectual though not introduced into the covenant itself but placed in some other part of the deed, if its application to the particular covenant is clear<sup>2</sup>; and it may arise by construction although not expressly stated<sup>3</sup>. A covenant in form absolute may be qualified by another covenant providing for an alternative event<sup>4</sup>.

Where a group of covenants, such as covenants for title, occur in a deed and some of the covenants are expressly qualified and others are in form absolute, the qualifying words may on the construction of the deed be held to apply to the covenants which are absolute in form<sup>5</sup>.

1 Thus a covenant for quiet enjoyment may be either absolute, so that the covenantor covenants against lawful disturbance by any person whomsoever, or it may be qualified by a limitation to disturbance by the covenantor or persons rightfully claiming under him: see *Sanderson v Berwick-upon-Tweed Corp'n* (1884) 13 QBD 547, CA; *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680, CA.

2 See *Brown v Brown* (1661) 1 Lev 57, where covenants for title were qualified by a 'remote agreement at the end of the deed'.

3 See *Sicklemore v Thistleton* (1817) 6 M & S 9 (where a surety for a lessee was not chargeable until after 40 days' default by the lessee and demand made on the surety). In *Hesse v Albert* (1828) 3 Man & Ry KB 406, a covenant to pay an annuity was qualified by a recital so as to be a covenant only to pay out of a particular source. On the other hand a recital in a conveyance which shows a defect in the grantor's title does not qualify his covenants for title, which must be construed with reference to the title expressed to be conveyed in the operative part, and he is liable for a breach arising through this defect (*Page v Midland Rly Co* [1894] 1 Ch 11, CA); nor is a covenant for title qualified by a reference to the instrument under which the title is derived, unless the interest expressed to be conveyed is in the operative part restricted to whatever was thereby acquired (*Cooke v Founds* (1661) 1 Lev 40; *May v Platt* [1900] 1 Ch 616 at 620; and cf *Delmer v M'Cabe* (1863) 14 ICLR 377 at 384).

4 *Hemans v Picciotto* (1857) 1 CBNS 646 (agreement to pay sum by instalments for specified work, with agreement, if work not proceeded with, to refer remuneration to arbitration); and cf *Molyneux v Richard* [1906] 1 Ch 34 (absolute covenant to build house not restricted by power to use land for spoil banks).

5 See eg *Browning v Wright* (1799) 2 Bos & P 13; and SALE OF LAND.

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**259. Qualification implied from circumstances.**

Covenants may also be qualified by the circumstances of the particular case. Thus a covenant in terms absolute may be restricted to events which, having regard to the circumstances, both parties, at the time when the covenant was entered into, contemplated, or ought to have contemplated if they had thought properly about the matter<sup>1</sup>. It is not sufficient that one of the parties did in fact contemplate a wider interpretation<sup>2</sup>.

1 *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680 at 686, CA, per Lord Esher MR. The purchaser of a defective title has a right to a conveyance without any words limiting the implied covenants for title therein: *Re Geraghty and Lyons' Contract* (1919) 53 ILT 57.

2 *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680, CA.

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## **(v) Joint and Several Covenants**

### **260. Several covenantors or covenantees.**

Where there are several covenantors or covenantees the covenant may, as regards the liability of the covenantors, be either joint or several, or at once joint and several; and it may, as regards the benefit to the covenantees, be either joint or several, or now, it seems<sup>1</sup>, both joint and several. The effect of the covenant depends upon the ordinary rules of construction, assisted, especially as regards the benefit of the covenant, by the nature of the interests of the parties in its subject matter<sup>2</sup>.

1 See PARA 264 post.

2 See PARAS 111 ante, 265 post; and CONTRACT vol 9(1) (Reissue) PARA 1079 et seq.

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## **261. Where liability under covenant is joint.**

A covenant is joint, as regards the liability of the covenantors, where two or more persons, without any words of severance, covenant for themselves that they will do something, or that they or one of them will do something; that is, where the obligation is imposed upon the covenantors simply<sup>1</sup>. The effect is that, while the covenantors are all living, anyone who is sued alone can insist on the others being joined<sup>2</sup>, and upon the death of one the entire liability devolves upon the survivors or survivor<sup>3</sup>.

The effect of a covenant which, as regards the liability of the covenantors, is in form clearly joint depends on the words themselves, and it is not controlled by the circumstance that the covenantors have separate interests in the subject matter of the covenant. If, however, it is doubtful whether the covenant is joint or several, this is one of the points to be taken into consideration. In such a case it is permissible to look at the other parts of the deed, the interests of the covenantors, and any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties<sup>4</sup>.

There is no principle of equity requiring joint covenants to be treated as joint and several<sup>5</sup>. A joint covenant by partners will be considered as several, at any rate in a mercantile partnership, if it simply represents a pre-existing partnership liability, but not if the obligation arises solely under the covenant. The extent of the covenant is then measured only by its language<sup>6</sup>.

1 Eg: We, A and B, bind ourselves, our heirs, executors, and administrators to pay £4,000 (*Simpson v Vaughan*) (1739) 2 Atk 31; A and B do hereby for themselves, their executors, administrators, and assigns, covenant with C that they, A and B or one of them, their executors, administrators, or assigns, will pay the rent reserved by a lease and keep the premises in repair (*Clarke v Bickers* (1845) 14 Sim 639; *White v Tyndall*) (1888) 13 App Cas 263, HL; L and R (R being a surety) covenant with C that they will pay rent, and further that L will repair; the covenant to repair, as well as the covenant to pay the rent, is joint (*Copland v Laporte*) (1835) 3 Ad & El 517). Words purporting to make not only an original obligor, but also his executors, jointly liable with the other obligors, however, have no effect. The liability of executors under a joint and several covenant is necessarily several only: *Read v Price* [1909] 1 KB 577; affd [1909] 2 KB 724, CA.

2 See *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504 at 515, HL.

3 *White v Tyndall* (1888) 13 App Cas 263, HL.

4 *White v Tyndall* (1888) 13 App Cas 263 at 276, HL, per Lord Herschell.

5 *Sumner v Powell* (1816) 2 Mer 30; and cf *Primrose v Bromley* (1739) 1 Atk 89 at 90.

6 *Sumner v Powell* (1816) 2 Mer 30; *Beresford v Browning* (1875) LR 20 Eq 564 (affd (1875) 1 ChD 30, CA). A covenant for payment off of a partner's share is in general an arrangement for discharging a pre-existing joint and several liability, and will be treated as joint and several: *Beresford v Browning* supra. Where, however, the covenant was the joint covenant of continuing partners to pay sums to an outgoing partner as the purchase price of his share, it was held to be not merely a security for but different from the pre-existing liability, and was not several in equity (*Wilmer v Currey* (1848) 2 De G & Sm 347); and joint covenants in a lease taken by partners for partnership purposes have been construed as joint only (*Clarke v Bickers* (1845) 14 Sim 639; *Levy v Sale* (1877) 37 LT 709). In *Sumner v Powell* supra a joint covenant to indemnify the executors of a deceased partner was held to be joint only. The distinction between the circumstances in *Wilmer v Currey* supra and *Beresford v Browning* supra is slight, and the authority of *Wilmer v Currey* supra seems to be doubtful. A joint covenant by partners, although treated in equity as only joint during the lives of the partners, is in effect made several on the death of one, and the covenantee can prove against his estate (*Kendall v Hamilton* (1879) 4 App Cas 504 at 517, HL; *Re Hodgson, Beckett v Ramsdale* (1885) 31 ChD 177, CA), although he cannot maintain an action for administration of that estate (*Re McRae, Forster v Davis, Norden v McRae* (1883) 25 ChD 16, CA). As

to proof in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 490 et seq. As to joint and several liability on a guarantee given by a firm and also by the several partners see *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557, CA; and CONTRACT vol 9(1) (Reissue) PARA 1080 et seq; PARTNERSHIP vol 79 (2008) PARA 74.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(10) COVENANTS/(v) Joint and Several Covenants/262. Where liability is several.

**262. Where liability is several.**

Where there are several covenantors and each undertakes only as regards his own acts or defaults, the covenant is said to be several, and the effect is the same as if several deeds were written upon the same piece of parchment<sup>1</sup>. This form of covenant is employed when an aggregate sum is to be secured, but each covenantor is to be liable for only a part of it; as where a number of people covenant 'severally' to pay, one person £3, another £3 etc<sup>2</sup>, or where, without the word 'severally', they covenant to pay £50 each<sup>3</sup>.

1 *Mathewson's Case* (1597) 5 Co Rep 22b.

2 *Mathewson's Case* (1597) 5 Co Rep 22b.

3 *Armstrong v Cahill* (1880) 6 LR Ir 440. So, in *Collins v Prosser* (1823) 1 B & C 682, A and B were bound in £1,000 each; this was several, and was not avoided as to A by the seal of B being removed. See PARA 111 ante.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(10) COVENANTS/(v) Joint and Several Covenants/263. Where liability is joint and several.

### **263. Where liability is joint and several.**

In general a covenant is framed so as to be at once joint and several, and then it is at the election of the covenantee in which form he shall sue upon it; whether to charge all the covenantors together or the survivor alone on the joint covenant, or to charge one alone, or the executor of a deceased covenantor, with the entire liability on the several covenant<sup>1</sup>. A joint and several covenant is now usually made by the words 'jointly and severally' but it will arise from any other words which have the same effect, such as we and each of us covenant<sup>2</sup>, or A and B covenant for themselves and each of them<sup>3</sup>.

1 *May v Woodward* (1677) Freem KB 248.

2 *Robinson v Walker* (1703) 1 Salk 393; *Duke of Northumberland v Errington* (1794) 5 Term Rep 522.

3 *Bolton v Lee* (1672) 2 Lev 56; *Robinson v Walker* (1703) 1 Salk 393. Such a covenant has also been held to arise from the words 'for themselves and either of them' (*Enys v Donnithorne* (1761) 2 Burr 1190; and see *Church v King* (1836) 2 My & Cr 220); and from 'for themselves and every of them' (*May v Woodward* (1677) Freem KB 248). See also *Tippins v Coates* (1853) 18 Beav 401; and PARAS 110, 116 ante. On the construction of an agreement by joint owners to assign a patent, it was held that they should enter into joint and several covenants of title: *National Society for Distribution of Electricity by Secondary Generators v Gibbs* [1900] 2 Ch 280, CA.



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## **264. Benefit of joint covenant.**

As regards the benefit of a covenant, the covenant may be made with the covenantees jointly, or with each of them severally. Apparently, apart from statutory provision, a single covenant could not be made with the covenantees jointly and severally, so as to leave it to the election of the covenantees whether to sue together or separately on the same covenant<sup>1</sup>.

However, now a covenant made or implied after 31 December 1881 with two or more jointly to pay money or to make a conveyance or to do any other act, to them or for their benefit, is deemed to include and by statute implies an obligation to do the act to, or for the benefit of, the survivor or survivors of them and to, or for the benefit of, any other person to whom the right to sue on the covenant devolves, and where made after 31 December 1925 is construed as being also made with each of them<sup>2</sup>.

If the covenant is joint only, then, so long as all the covenantees are living, all must sue together<sup>3</sup>; upon the death of any one of them, the action must be brought by the survivors, whether the breach of covenant occurred before the death<sup>4</sup> or after<sup>5</sup>. If the covenant is joint and several by virtue of the Law of Property Act 1925<sup>6</sup>, it can presumably be enforced either as a joint covenant or (as several) by any covenantee or his personal representatives.

A covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons is construed and capable of being enforced in like manner as if it had been entered into with the other person or persons alone<sup>7</sup>. This provision applies to covenants and agreements whenever entered into<sup>8</sup>. A covenant is, however, enforceable by virtue of this provision only so far as it would have been enforceable if originally entered into with the covenantees other than the covenantor<sup>9</sup>.

1 *Slingsby's Case* (1587) 5 Co Rep 18b at 19a, Ex Ch (a man cannot bind himself to three and to each of them to make it joint and several at the election of several persons for one and the same cause).

2 See the Law of Property Act 1925 s 81(1); and see *Josselson v Borst and Gilksten* [1938] 1 KB 723, [1937] 3 All ER 722, CA. In its application to instruments made after 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 ante), the Law of Property Act 1925 s 81(1) is modified: see s 81(5) (as added); and CONTRACT vol 9(1) (Reissue) PARAS 1081-1082. See further PARA 256 ante. Section 81 (as amended) extends to a covenant implied by the Act: see s 81(2); and PARA 256 ante. It applies only if and so far as a contrary intention is not expressed in the covenant and has effect subject to the provisions contained in the covenant: s 81(3). The provision also extends to covenants implied under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): s 8(2).

3 *Sorsbie v Park* (1843) 12 M & W 146 at 157-158; *Lane v Drinkwater* (1834) 1 Cr M & R 599 at 613.

4 *Eccleston v Clipsham* (1668) 1 Saund 153.

5 *Foley v Addenbrooke* (1843) 4 QB 197. As to payment to one of two joint obligees of a bond see *Steeds v Steeds* (1889) 22 QBD 537; *Powell v Brodhurst* [1901] 2 Ch 160 at 164; para 137 ante; and CONTRACT vol 9(1) (Reissue) PARA 1086.

6 See the Law of Property Act 1925 s 81(1); and note 2 supra.

7 Ibid s 82(1). Formerly the covenant could not be sued on: *Boyce v Edbrooke* [1903] 1 Ch 836; *Ellis v Kerr* [1910] 1 Ch 529 (explaining *Rose v Poulton* (1831) 2 B & Ad 822); *Napier v Williams* [1911] 1 Ch 361. The Law of Property Act 1925 s 82(1) has been held to have no application to the contract constituted by the rules of a trade union viewed as a contract between each member and the other members of the union: *Bonsor v*

*Musicians' Union* [1954] Ch 479 at 493, [1954] 1 All ER 822 at 827-828, CA, per Sir R Evershed MR, and at 521-522 and 844-845 per Jenkins LJ; revsd on other grounds [1956] AC 104, [1955] 3 All ER 518, HL.

8 Law of Property Act 1925 s 82(2). It extends to covenants implied by statute (see PARA 256 ante) in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before 1 January 1926: s 82(2).

9 Where on a sale of land before 1926 by owners in common to one of themselves, the purchaser in accordance with an intended building scheme entered into restrictive covenants with the vendors which were unenforceable because the purchaser was also one of the vendors, the defect in the covenants was not cured by ibid s 82 (see the text to notes 7-8 supra), so far as to render them enforceable by a successor in title to other land of the vendors intended to be subject to the scheme; for, if the covenants had in the first instance been entered into with the vendors other than the covenantor, they would not have enured for the benefit of the whole of the interests in the land retained and would not have created the mutuality of obligation which is an essential ingredient for the enforcement of a building scheme: *Ridley v Lee* [1935] Ch 591 at 603-604. As to covenants entered into as part of building schemes see EQUITY vol 16(2) (Reissue) PARAS 624-625.

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## **265. Construction affected by interests of covenantees.**

The construction of a covenant with several covenantees depends, as regards its being joint or several, very largely on the interests of the covenantees in the subject matter of the covenant. Here, as in other cases, the intention of the parties, as expressed by their words, prevails, and by clear words a covenant may be made with covenantees jointly, although their interests are several, and vice versa. The court leans, however, against this separation between the nature of the covenant and the nature of the interest, and where the interest is joint the covenant will be joint if the words are capable of that construction; where the interests are several, the covenant will in the same manner be construed, if possible, as several<sup>1</sup>. The express language must not be contradicted, but it will be moulded to suit the interests according as they are joint or several<sup>2</sup>.

With regard to covenants made on or after 1 January 1926 with two or more persons jointly, the above principles of construction have to be applied while bearing in mind the enactment<sup>3</sup> that, unless a contrary intention is expressed in the covenant and subject to the provisions contained in it, such a covenant is to be construed as being also made with each of the covenantees. Any such joint covenant is therefore, in the absence of an express contrary intention, also several. Apart from the direct effect of this enactment on the construction of a joint covenant, the draftsman of a post-1925 covenant is assumed to be choosing its words so as to operate against background law including the enactment. It can therefore have an indirect effect on the construction of any covenant. The older decided cases where covenants were construed as joint<sup>4</sup> or as several<sup>5</sup> must in relation to post-1925 covenants be applied subject to this qualification and to the direct effect of the enactment.

1 *Sorsbie v Park* (1843) 12 M & W 146; *Bradburne v Botfield* (1845) 14 M & W 559 at 572 per Parke B; *Beer v Beer* (1852) 12 CB 60 at 78; and see *Haddon v Ayers* (1858) 1 E & E 118. It was formerly supposed to be a rule of law that a covenant was, as regards the covenantees, joint when their interests were joint, and vice versa, notwithstanding that the words of the covenant were to the contrary: *Justice Windham's Case* (1589) 5 Co Rep 7a at 8a; *Eccleston v Clipsham* (1668) 1 Saund 153; *James v Emery* (1818) 8 Taunt 245 at 248, Ex Ch; *Withers v Bircham* (1824) 3 B & C 254. This was upon the ground that to allow separate actions when the interest was the same would charge the covenantor twice over: *Slingsby's Case* (1587) 5 Co Rep 18b at 19a, Ex Ch; *Lilly v Hodges* (1723) 8 Mod Rep 166. But in Preston's edition of Sheppard's Touchstone it was suggested (at 166) that the rule was only applicable when the words were ambiguous. In *Sorsbie v Park* (1843) 12 M & W 146 at 157 per Lord Abinger CB, this gloss on the old rule was accepted, and since then the rule has been treated as one of construction only. See further CONTRACT vol 9(1) (Reissue) PARA 1083.

2 *White v Tyndall* (1888) 13 App Cas 263 at 277, HL, per Lord Herschell. This seems to represent the judgments in *Sorsbie v Park* (1843) 12 M & W 146 and *Bradburne v Botfield* (1845) 14 M & W 559. To enable the test of joint or several interests to be applied, the language of the covenant must not be ambiguous in the ordinary sense; it is sufficient that it is capable of being construed several, though in form joint, and vice versa. This will not be so, however, if it is expressly 'joint' or expressly 'several': see *Bradburne v Botfield* supra at 563 per Parke B.

3 See the Law of Property Act 1925 s 81 (as amended); and PARA 264 ante. In its application to instruments made after 31 July 1990 (ie the date on which the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as originally enacted) came into force: see s 1(11); and PARA 7 text and note 4 ante), the Law of Property Act 1925 s 81(1) is modified: see s 81(5) (as added); para 264 ante; and CONTRACT vol 9(1) (Reissue) PARAS 1081-1082.

4 The following are instances of covenants which were treated as joint: (1) covenant for title entered into with joint grantees and each of them; in this case the covenant was at first joint, and, since this suited the joint interest, the words 'each of them' were rejected (*Slingsby's Case* (1587) 5 Co Rep 18b, Ex Ch); (2) covenant between co-adventurers by each with the other and others of them; all had the same interest in the covenant and it was joint (*Eccleston v Clipsham* (1668) 1 Saund 153); (3) covenant whereby musicians bound themselves

in £20, each to the other jointly and severally, not to play asunder; the interest being joint, 'severally' was repugnant (*Spencer v Durant* (1688) Comb 115 (the actual words were 'omnibus et cuilibet eorum'); and see 1 Show 8; cf *Saunders v Johnson* (1693) Skin 401); (4) covenant with L and B to pay to L and B an annuity of £30, namely, £15 to L and £15 to B, with joint powers for securing the annuity (*Lane v Drinkwater* (1834) 1 Cr M & R 599); (5) covenant between subscribers to a new corn market to pay sums set opposite their names, the covenant being by the subscribers to and with each other, and to and with trustees; the trustees sued alone; held, that the covenant was prima facie joint with the subscribers and trustees, and that the trustees had no separate interest by which the covenant could be made several (*Sorsbie v Park* (1843) 12 M & W 146; and see *Pugh v Stringfield* (1857) 3 CBNS 2, where, upon a guarantee for the completion of buildings given to three mortgagees of separate properties, it was held that the interest, and also the benefit of the covenant, was joint).

A covenant with two jointly for payment of a sum of money confers a joint legal interest, and the covenant was construed as joint notwithstanding that only one was interested: *Rolls v Yate* (1610) Yelv 177; *Anderson v Martindale* (1801) 1 East 497; *Hopkinson v Lee* (1845) 6 QB 964. Where in a lease by several lessors the lessee entered into a covenant to repair which was capable of being treated as joint it was so treated, notwithstanding that one or more of lessors had no interest in the land (*Southcote v Hoare* (1810) 3 Taunt 87; *Wakefield v Brown* (1846) 9 QB 209 at 223), or that the lessors were tenants in common, although their interests in the land were separate, they had a joint interest in the repairs (*Foley v Addenbrooke* (1843) 4 QB 197; *Bradburne v Botfield* (1845) 14 M & W 559). This was so although the lessors demised 'according to their several estates', and the lessees covenanted with them 'and their respective heirs and assigns': *Thompson v Hakewill* (1865) 19 CBNS 713 at 726. Upon a demise of a reversion on a lease to tenants in common, each could sue on the covenants in the lease without joining the others: *Roberts v Holland* [1893] 1 QB 665. Tenancy in common, however, cannot exist at law (Law of Property Act 1925 s 1(6)), and it can only exist in equity behind a trust of land (see s 34(1); the Settled Land Act 1925 s 36(4) (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 713). Hence covenants at law can only be with or by the trustees in whom the legal estate is vested and will be joint, and (by the effect of the Law of Property Act 1925 s 81 (as amended): see PARA 264 ante) also several.

5 The following are instances of covenants treated as several: where grants of different estates were made to A, B, and C respectively, and covenants for title entered into with them and each of them (*Slingsby's Case* (1587) 5 Co Rep 18b, Ex Ch); and similarly, where property was sold to purchasers in specified shares, and the vendor covenanted for title with each of them (*Mills v Ladbroke* (1844) 7 Man & G 218); where collectors of rents for A and B covenanted with A and B to pay a moiety to each of them (*Lilly v Hodges* (1723) 8 Mod Rep 166); where vendors were entitled in specified shares, a covenant with them and each of them to pay the purchase money (*James v Emery* (1818) 8 Taunt 245, Ex Ch); where there were vendors of different lands at separate prices to one purchaser, and the purchaser by the same deed covenanted with each to complete the purchase (*Poole v Hill* (1840) 6 M & W 835); where purchase money, or interest on purchase money, was to be paid to one vendor only (*Tippet v Hawkey* (1689) 3 Mod Rep 263; *Keightley v Watson* (1849) 3 Exch 716); where separate annuities had been granted, and a surety covenanted with the annuitants that, on default by the grantor, he would pay to them the annuities (*Withers v Bircham* (1824) 3 B & C 254); covenant by a ship's captain with part owners to pay moneys to them, 'and to their and every of their several and respective heirs, etc', in specified shares (*Servante v James* (1829) 10 B & C 410). A covenant entered into with partners jointly for the protection of the partnership business may have been enforceable by them severally after dissolution of the partnership: see *Palmer v Mallet* (1887) 36 ChD 411, CA.

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## **(vi) Dependent and Independent Covenants**

### **266. Three types of covenant.**

Where an agreement contains covenants on the part of each party towards the other the question arises whether one party can sue on the covenants in his own favour without alleging and proving either that he has performed, or that he has offered to perform, those on his part. In this respect covenants are classified as follows:

- 20 (1) such as are mutual and independent, and here either party may recover damages from the other for a breach of the covenants in his favour, and it is no defence that he has not performed, or even that he has committed a breach of, those on his part;
- 21 (2) such as are conditional and dependent, in which the performance of one depends on the prior performance of the other; consequently, until the one which is the condition has been performed, no action will lie on the other which is dependent<sup>1</sup>;
- 22 (3) such as are mutually conditional (that is covenants which are to be performed at the same time) and here, if one party was ready and offered to perform his own part, and the other has neglected or refused to perform his, the former may maintain an action against the latter, though it is not certain that either was obliged to perform the first act<sup>2</sup>.

While these three cases are distinguishable, the second and third are frequently placed together, and the question is treated as being whether the covenants are independent, or whether they or one of them are or is dependent.

<sup>1</sup> See *Ughtred's Case* (1591) 7 Co Rep 9b at 10b. The covenant, however, which is a condition as regards the other is itself independent: see PARA 269 post.

<sup>2</sup> See the classification by Lord Mansfield in *Kingston v Preston* (1773), cited in 2 Doug KB at 689; *Jones v Barkley* (1781) 2 Doug KB 684.

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## **267. Whether covenants dependent or independent.**

Whether covenants are to be taken as dependent or independent is to be decided in accordance with the intention of the parties as appearing in the instrument. For this purpose no technical words are necessary<sup>1</sup>; and, indeed, to such intention, when once discovered, all technical forms of expression must give way<sup>2</sup>; the intention is to be collected from the instrument, and from the circumstances, legally admissible in evidence, with reference to which it is to be construed<sup>3</sup>. When the parties have expressly provided that one covenant is to be treated as a condition, effect will be given to this provision<sup>4</sup>, unless it has to be rejected as being clearly repugnant to the intention appearing on the whole instrument<sup>5</sup>; or, perhaps, unless a stipulation, though expressed to be conditional, is not in its nature a condition precedent to performance on the other side<sup>6</sup>.

1 *Hotham v East India Co* (1787) 1 Term Rep 638 at 645.

2 *Porter v Shephard* (1796) 6 Term Rep 665 at 668 per Lord Kenyon CJ; *Stavers v Curling* (1836) 3 Bing NC 355 at 368 per Tindal CJ; *Roberts v Brett* (1865) 11 HL Cas 337 at 354.

3 *Graves v Legg* (1854) 9 Exch 709 at 716 per Parke B; *Bettini v Gye* (1876) 1 QBD 183 at 187; see *Kingston v Preston* (1773), cited in 2 Doug KB at 689; *Kidner v Stimpson* (1918) 35 TLR 63, CA (where mutual covenants with respect to drainage of land were held to be dependent).

4 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 919, HL.

5 The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument: *London Gas-Light Co v Chelsea Vestry* (1860) 8 CBNS 215 at 239 per Byles J.

6 See *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 920, HL, per Lord Selborne LC (dissenting).

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## **268. Rules of construction.**

The question whether covenants are dependent or independent does not depend upon the order in which they occur in the deed, but usually either upon the order of time in which the intent of the transaction requires their performance<sup>1</sup>, or upon the nature of the contract and the acts to be performed by the contracting parties<sup>2</sup>; and with regard to these two considerations, order of performance in point of time and the nature of the contract, certain rules have been recognised<sup>3</sup>. The rules, however, do not determine absolutely the dependence or independence of covenants in all cases; they merely furnish a guide to the discovery of the intention of the parties<sup>4</sup>; and in general covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor<sup>5</sup>.

1 *Kingston v Preston* (1773), cited 2 Doug KB at 689.

2 *Hotham v East India Co* (1787) 1 Term Rep 638 at 645.

3 See PARAS 269-270 post.

4 *Roberts v Brett* (1865) 11 HL Cas 337 at 354.

5 *Newson v Smythies* (1858) 3 H & N 840 at 843 per Pollock CB.

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## 269. Rules regarding order of performance.

As regards order of performance of covenants in point of time, the following five rules apply<sup>1</sup>:

- 23 (1) If there are mutual covenants between A and B, and A's covenant has to be performed on a specified day, while B's covenant has to be performed on a later day, A's covenant is independent of B's covenant. A must perform it at the fixed date, and the consideration for the performance of it is not the performance of B's covenant, but B's promise to perform it. Consequently A must rely on his remedy against B, and cannot excuse his own non-performance on the ground of B's failure to perform his covenant<sup>2</sup>.
- 24 (2) In the same circumstances A's covenant is a condition precedent to the performance of B's, and the latter covenant is dependent<sup>3</sup>. The liability on B's covenant does not arise unless A's covenant is performed. In general, where one covenant is to be performed before the other it is a condition precedent<sup>4</sup>; and conversely, if the time of performance for one covenant is not fixed, but it is stated to be a condition precedent, this prima facie limits the time of its performance to the period antecedent to the date of the other covenant<sup>5</sup>, since a later performance cannot be a condition precedent to an earlier<sup>6</sup>.
- 25 (3) If while the date of performance of A's covenant is fixed, that of B's covenant is not fixed, but B's covenant may have to be performed after A's covenant, A's covenant is still independent<sup>7</sup>.
- 26 (4) In the circumstances referred to in head (3) above, B's covenant is also independent. Since neither covenant is necessarily earlier in date, neither is a condition precedent. The two covenants are mutual and independent; and either party relies not on performance by, but on his remedy against, the other<sup>8</sup>.
- 27 (5) Where the covenants are to be performed at the same time, and each is the consideration for the other, they are mutually dependant; each is a condition precedent to the performance of the other, and neither party can maintain an action without alleging and proving that he has performed, or was ready and willing to perform, his own covenant<sup>9</sup>. Here the consideration moving to each party is the performance by, not the promise of, the other.

1 Heads (1) and (2) in the text correspond to the first two rules in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319 at 320b, c, except that the parts of the first of those rules enclosed in brackets are reserved to be the subject of head (3) in the text: '1. If a day be appointed for payment of money . . . or for doing any other act, and the day is to happen, [or may happen] before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: [and so it is where no time is fixed for the performance of that which is the consideration of the money or other act] . . . But, 2. When a day is appointed for the payment of money etc, and the day is to happen after the thing which is the consideration of the money etc, is to be performed, no action can be maintained for the money etc, before performance'. The rules are taken from the judgment of Holt CJ in *Thorpe v Thorpe* (1701) 1 Salk 171, but when the parts in brackets of the first rule are removed, the second is seen to be merely supplementary to the first, and they are both included in the statement that, when the performances are to take place at successive dates, the earlier covenant is independent as regards the later, but is itself a condition, and the later covenant is dependent upon it. See also notes 7-9 infra.

2 Instances where the performance of one covenant was fixed definitely before that of the other, and was therefore independent of that other, are: *Tolcelser's Case* (1374) stated in 12 Mod Rep 461 (covenant by Pool to serve Tolcelser with three esquires in the French wars, and covenant by Tolcelser to pay him 20 marks before



they went to France; Pool could sue for the 20 marks, although the service had not been rendered); *Russen v Coleby* (1736) 7 Mod Rep 236 (covenant by A to pay seamen their wages yearly, and by B in consideration thereof to pay A £42 every month; A was allowed to sue for the £42 without alleging payment of the wages); *Walker v Harris* (1793) 1 Anst 245 (covenant by A to take B as partner from and after 29 September; by B to pay £300 on or before that day); *Terry v Duntze* (1795) 2 Hy Bl 389 (A covenants to build a house by a certain day, and B to pay by instalments as the building proceeds); *Dicker v Jackson* (1848) 6 CB 103; *Yates v Gardiner* (1851) 20 LJ Ex 327; *Weston v Collins* (1865) 34 LJ Ch 353 (all cases where date for payment of purchase-money was fixed, but not for completion otherwise); *Workman, Clark & Co v Lloyd Brasileiro* [1908] 1 KB 968, CA (agreement to build steamer, price to be paid in instalments as work proceeded). See also *Judson v Bowden* (1847) 1 Exch 162, where one covenant was to be performed partly before and partly after the other, and was therefore not a condition precedent.

Instances where performance of the earlier covenant was a condition precedent to suing on the later are: where work is to be done, and then payment is to be made (see cases cited in *Morton v Lamb* (1797) 7 Term Rep 125 at 130); *Earl Feversham v Watson* (1680) Cas temp Finch 445 (covenant in marriage settlement by husband to be performed before covenant by wife's father); cf *Roberts v Brett* (1865) 11 HL Cas 337 (where the performance of an agreement was to be secured by each party's bond, and the giving of the bond was a condition precedent to suing on the contract). See also CONTRACT vol 9(1) (Reissue) PARA 966 et seq.

3 See note 1 supra.

4 *Neale v Ratcliff* (1850) 15 QB 916; *Henman v Berliner* [1918] 2 KB 236 (lessee's covenant to repair a house, 'the same being first put in repair' by the lessor; the latter is a condition precedent); and see *Peeters v Opie* (1671) 2 Wms Saund 346 at 350 (payment to be made for work done).

5 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 920, HL, per Lord Watson.

6 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911 at 916, HL, per Lord Blackburn.

7 This represents the effect of the first rule in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319, so far as not stated in head (1) in the text. The separate statement of this part of the rule makes the relation of the first two rules in *Pordage v Cole* supra clearer, and leads up to head (4) in the text.

Instances where the date of one covenant only was fixed, and the other, since it might be performed later, was not a condition precedent, so that the former was independent, are: *Pordage v Cole* supra (agreement between A and B that B pays A a sum of money); *Campbell v Jones* (1796) 6 Term Rep 570 (covenant by A to teach B with all possible expedition a specified art, and by B to pay £250 on a fixed date); *Mattock v Kinglake* (1839) 10 Ad & El 50 (covenant by A on a purchase to pay the purchase money on a fixed day, no day being fixed for conveyance; and see to the same effect *Wilks v Smith* (1842) 10 M & W 355 at 360 and *Sibthorp v Brunel* (1849) 3 Exch 826); *Thames Haven Dock Co v Brymer* (1850) 5 Exch 696, Ex Ch (covenant to deduce title held to be a condition precedent to preparation of conveyance); *Christie v Borelly* (1860) 7 CBNS 561 (guarantee of payment of bills at maturity in consideration of guarantee of payment not fixed as to date; and see *Seeger v Duthie* (1860) 8 CBNS 45).

8 This is not stated in the rules in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319, but is necessary in order to show completely the relation of the two covenants: see *Campbell v Jones* (1796) 6 Term Rep 570; *Jeston v Key* (1871) 6 Ch App 610.

9 This is the fifth rule in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319 at 320e: '5. Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing a performance of, or an offer to perform, his part though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale'. See *Glazebrook v Woodrow* (1799) 8 Term Rep 366 at 374.

The following cases illustrate the rule: *Kingston v Preston* (1773), cited in 2 Doug KB 689 (covenant by A to give up his business to B, and by B to procure security for the price 'at or before delivery of the deeds'); *Large v Cheshire* (1671) 1 Vent 147 (C covenants to pay L a sum of money, L 'making him' a sufficient estate in certain lands); *Callonel v Briggs* (1703) 1 Salk 112 (A agreed to pay B so much money for stock six months after the bargain, B transferring the stock); and see *Stapleton v Lord Shelburne* (1725) 1 Bro Parl Cas 215, HL; *Goodisson v Nunn* (1792) 4 Term Rep 761; *Morton v Lamb* (1797) 7 Term Rep 125 (agreement by A in consideration that B had bought corn at a certain price, to deliver it within one month); *Glazebrook v Woodrow* (1799) 8 Term Rep 366 (covenant by A to sell a schoolhouse to B, and convey on or before 1 August, and by B to pay £120 on or before 1 August; conveyance and payment were mutual conditions, notwithstanding that possession had been given by A, the conveyance being the material part); *Marsden v Moore and Day* (1859) 4 H & N 500 (covenant for payment of £250 for purchase of share in mining settl). See also *Heard v Wadham* (1801) 1 East 619, where payment and conveyance were to be simultaneous; and as to sale where goods passed on both sides see *Atkinson v Smith* (1845) 14 M & W 695.

It is in general sufficient that the party suing alleges readiness to perform his own covenant (*Turner v Goodwin* (1714) 10 Mod Rep 153, 189, 222); and a vendor of land need not, in an action against the purchaser, aver tender of a conveyance; it is sufficient to allege that he has always been ready and willing to execute a conveyance, it being the purchaser's duty to prepare and tender the conveyance (*Poole v Hill* (1840) 6 M & W 835; *Laird v Pim* (1841) 7 M & W 474). As to other contracts see *Giles v Giles* (1846) 9 QB 164; *Doogood v Rose* (1850) 9 CB 132.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(10) COVENANTS/(vi) Dependent and Independent Covenants/270. Rules regarding nature of contract.

## 270. Rules regarding nature of contract.

As regards the nature of the contract, the following rules apply:

- 28 (1) If the covenants on either side form the entire consideration for each other, they are mutually dependent; each is a condition precedent, and neither party can sue without alleging that he has performed his covenant, or that he is ready and willing to perform it<sup>1</sup>.
- 29 (2) If, however, the covenant by A is part only of the consideration for the other covenant by B, and the remainder of that consideration has been performed by A (such remainder being a substantial part of the entire consideration<sup>2</sup>), then A's covenant, although originally a condition precedent, ceases to be so, and B's covenant is treated as an independent covenant. Consequently, A can then sue for a breach of B's covenant without alleging performance of his own covenant<sup>3</sup>. The application of this rule in favour of A, who has performed the substantial part of his consideration, will be facilitated if one of his covenants is to be performed after B's covenant<sup>4</sup>. If, however, the partial performance on one side is exactly compensated by partial performance on the other, the rule does not apply<sup>5</sup>.
- 30 (3) Where the opposite covenants are not given by way of mutual consideration, or where they have no relation to each other, they are independent. The damages sustained by breach of one may be no measure of the damages sustained by breach of the other<sup>6</sup>, and the parties are left to their remedies by action. Thus covenants on either side to give security for performing an agreement are independent as regards each other, although as regards the actual obligations of the agreement on either side they may be conditions precedent<sup>7</sup>.

1 This is the fourth rule in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319 at 320e: '4. Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and performance must be averred'. See *Oxford v Provan* (1868) LR 2 PC 135 at 156. Accordingly, where a vendor had so changed the property by cutting down timber that he could not properly perform his covenant, he could not sue for the purchase money (*Duke of St Albans v Shore* (1789) 1 Hy Bl 270); and where a master had disabled himself from fulfilling his duty to teach his apprentice, he could not sue for desertion (*Ellen v Topp* (1851) 6 Exch 424). Where mutual considerations are indivisible, each side must perform the whole of his obligations to enable him to sue: *Chanter v Leese* (1838) 4 M & W 295 (affd (1839) 5 M & W 698, Ex Ch); *Neale v Ratcliff* (1850) 15 QB 916. Where a company agrees to employ a person as managing director for a fixed period, and he enters into a covenant not to carry on the same business, the agreements are interdependent, and if the employment is determined in consequence of the winding up of the company, the restriction on carrying on business cannot be enforced: *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA. See also CONTRACT vol 9(1) (Reissue) PARA 966 et seq.

Where a stipulation is introduced as a condition, and not as a covenant, it will be a condition precedent if it is of great importance to, or goes to the root of, the contract: see *Grafton v Eastern Counties Rly Co* (1853) 8 Exch 699; *Graves v Legg* (1854) 9 Exch 709; *Bradford v Williams* (1872) LR 7 Exch 259; *Poussard v Spiers and Pond* (1876) 1 QBD 410 (opera singer disabled at commencement of engagement); *Bank of China, Japan and The Straits Ltd v American Trading Co* [1894] AC 266, PC. However, see *Bettini v Gye* (1876) 1 QBD 183. As to arbitration being a condition precedent see INSURANCE vol 25 (2003 Reissue) PARA 188; as to conditions in charterparties see CARRIAGE AND CARRIERS vol 7 (2008) PARA 241 et seq; and as to covenants in leases see generally LANDLORD AND TENANT.

2 *Ellen v Topp* (1851) 6 Exch 424.

3 See the third rule in the notes to *Pordage v Cole* (1669) 1 Wms Saund 319 at 320c: '3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in

damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration'. It is only when the rest of the consideration has been paid that A's covenant ceases to be a condition precedent. It is then no longer competent for B to insist on the non-performance of that which was originally a condition precedent, and his covenant becomes independent. This is more correct than to say that A's covenant was never a condition precedent at all: *Graves v Legg* (1854) 9 Exch 709 at 717; *White v Beeton* (1861) 7 H & N 42 at 50. The reason is that since B has had part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it: *Campbell v Jones* (1796) 6 Term Rep 570. 'Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration': notes to *Pordage v Cole* (1669) 1 Wms Saund 319 at 320e; and see *Carter v Scargill* (1875) LR 10 QB 564.

The rule was established by *Boone v Eyre* (1779) 1 Hy Bl 273n (a), where A conveyed to B the equity of redemption of an estate in the West Indies, with the workers upon it, in consideration of £500 and a life annuity of £160; A covenanted for title, and B covenanted that, A well and truly performing all and everything therein contained on his part, he would pay the annuity. A having executed part of the consideration on his side by conveying the land, his want of title to the workers was not a bar to his action for the annuity. See *Ritchie v Atkinson* (1808) 10 East 295 at 306 per Lord Ellenborough CJ; *Havelock v Geddes* (1809) 10 East 555 at 564; *Fothergill v Walton* (1818) 8 Taunt 576 at 582 per Dallas CJ; *Stavers v Curling* (1836) 3 Bing NC 355 at 368; *Seeger v Duthie* (1860) 8 CBNS 45 at 71. Examples of the rule are furnished by *Campbell v Jones* (1796) 6 Term Rep 570; *Carpenter v Cresswell* (1827) 4 Bing 409. Where mutual covenants are entered into in a marriage settlement and the marriage takes place they are independent: *Lloyd v Lloyd* (1837) 2 My & Cr 192. Where one party is to supply goods, and the other to pay an agreed price, the supply of all the goods is not a condition precedent: *Macintosh v Midland Counties Rly Co* (1845) 14 M & W 548; *Eastern Counties Rly Co v Philipson* (1855) 16 CB 2; *London Gas-Light Co v Chelsea Vestry* (1860) 8 CBNS 215. See also *Wilkinson v Clements* (1872) 8 Ch App 96; *Huntoon Co v Kolynos (Inc)* [1930] 1 Ch 528.

To the same principle may be referred the rule that in apprenticeship deeds the covenants are independent, and misconduct on the part of the apprentice does not bar his action against the master for breach of covenant (*Winstone v Linn* (1823) 1 B & C 460; *Phillips v Clift* (1859) 4 H & N 168); but desertion by the apprentice (*Hughes v Humphreys* (1827) 6 B & C 680; and see *Branch v Ewington* (1780) 2 Doug KB 518), or serious misconduct (*Westwick v Theodor* (1875) LR 10 QB 224; *Learoyd v Brook* [1891] 1 QB 431), or refusal to be taught (*Raymond v Minton* (1866) LR 1 Exch 244), excuses the master; and he need not return any part of the premium, even though the apprentice was willing to return and the master refused to take him back (*Cuff v Brown* (1818) 5 Price 297).

4 *Newson v Smythies* (1858) 3 H & N 840 at 843 per Bramwell B. The case is also within the first rule regarding order of performance (see PARA 269 ante), and none of A's covenants is a condition precedent.

5 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL (engagement of employee at a salary, with a covenant in restraint of trading after the termination of the engagement; the salary and the service are equivalent to each other; this leaves the employment and the restriction mutually conditional, and a wrongful dismissal releases from the restriction). See also *Measures Bros Ltd v Measures* [1910] 2 Ch 248, CA.

6 *Thomas v Cadwallader* (1744) Willes 496 at 499; and see *Warren v Arthur* (1682) 2 Mod Rep 317 (covenant by lessee that lessor may fell trees, and by lessor to repair the hedges where they grow); *Cannock v Jones* (1849) 3 Exch 233 (covenants by lessor and lessee to repair separate parts of the premises); *Gibson v Goldsmid* (1854) 5 De GM & G 757 (covenants as to transfer of property and indemnity in a deed of dissolution of partnership); *Chitty v Bray* (1883) 48 LT 860 (restrictive covenants affecting adjoining plots of land, but differing as to object and importance, treated as independent); *Fearon v Earl of Aylesford* (1884) 14 QBD 792, CA (covenants between the husband and the trustee for the wife in a separation deed).

7 *Roberts v Brett* (1865) 11 HL Cas 337.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(10) COVENANTS/(vii) Covenants with a Penalty/271. Liquidated damages and penalties.

## **(vii) Covenants with a Penalty**

### **271. Liquidated damages and penalties.**

A contract may specify a sum as being payable upon breach, and, if it contains several stipulations, the sum may be expressed to be payable on breach either of one or more specified stipulations, or of any of the stipulations; it is usual to describe such a sum as either a penalty or liquidated damages<sup>1</sup>. Although regard must be had to the description in the contract<sup>2</sup>, it is not conclusive; and if upon the whole instrument it appears that the sum is a penal sum, it will be so treated and vice versa<sup>3</sup>.

1 See *Lowe v Peers* (1768) 4 Burr 2225 at 2228. As to contracts by local authorities specifying a penalty see *Soothill Upper Urban Council v Wakefield RDC*[1905] 2 Ch 516, CA.

2 *Willson v Love*[1896] 1 QB 626 at 630, CA, per Lord Esher MR ('no case, I think, decides that the term used by the parties themselves is to be altogether disregarded . . . where the parties themselves call the sum made payable a 'penalty', the onus lies on those who seek to show that it is to be payable as liquidated damages'). However, much reliance is not to be placed on the description: *Law v Redditch Local Board*[1892] 1 QB 127 at 131, CA; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda*[1905] AC 6 at 9, HL. See DAMAGES vol 12(1) (Reissue) PARA 1065 et seq.

3 *Betts v Burch* (1859) 4 H & N 506 at 511 per Bramwell B (see this case as to the origin of the above rule of construction); *Sainter v Ferguson* (1849) 7 CB 716 at 727. See *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd*[1962] 1 All ER 418, [1962] 1 WLR 34; *Robophone Facilities Ltd v Blank*[1966] 3 All ER 128, [1966] 1 WLR 1428, CA. See also *Bridge v Campbell Discount Co Ltd*[1962] AC 600, [1962] 1 All ER 385, HL; and CONSUMER CREDIT vol 9(1) (Reissue) PARA 23 et seq.

Halsbury's Laws of England/DEEDS AND OTHER INSTRUMENTS (VOLUME 13 (2007 REISSUE))/4. INTERPRETATION/(10) COVENANTS/(vii) Covenants with a Penalty/272. Whether covenantor can elect to break covenant.

## 272. Whether covenantor can elect to break covenant.

When there is a covenant to do or not to do a specified thing and a sum, whether a penalty or liquidated damages, is fixed to be paid on breach of the covenant, in general the covenantor has not the option of breaking the covenant upon payment of the fixed sum<sup>1</sup>. He is bound by the covenant, and, if positive, it will be enforced in an action for specific performance (where this is the appropriate remedy)<sup>2</sup>, and, if negative, it will be enforced by injunction<sup>3</sup>. The covenantee cannot, however, get both damages and an injunction; he must elect which of the two remedies he will take<sup>4</sup>. The question, however, is one of construction<sup>5</sup>, and if the intention of the covenant is that the covenantor is to be at liberty to do the prohibited act on payment of the penalty or stipulated sum, effect will be given to it accordingly<sup>6</sup>; and this will usually be the case where the penalty is in the nature of a recurring remuneration to the covenantee, as in the case of an increased rent reserved for breach of a covenant not to plough up pasture land<sup>7</sup>.

1 See *French v Macale* (1842) 2 Dr & War 269 at 274-275 per Sugden LC ('the general rule of equity is, that if a thing be agreed to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done . . . So if a man covenant to abstain from doing a certain act, and agree that, if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract'); *Chilliner v Chilliner* (1754) 2 Ves Sen 528; and see also *Prebble v Boghurst* (1818) 1 Swan 309 at 412 n (3); Fry on Specific Performance (6th Edn) 65-74.

2 Eg in cases of bonds to secure an agreement for settlement of property on marriage (*Nandike v Wilkes* (1716) Gilb Ch 114; *Chilliner v Chilliner* (1754) 2 Ves Sen 528; *Prebble v Boghurst* (1818) 1 Swan 309; *Roper v Bartholomew* (1823) 12 Price 797); bond in consideration of marriage to leave property by will (*Logan v Wienholt* (1833) 1 Cl & Fin 611, HL); bond to secure an agreement to grant a lease (*Butler v Powis* (1845) 2 Coll 156); penalty in a contract for purchase of land (*Howard v Hopkyns* (1742) 2 Atk 371). As to specific performance generally see SPECIFIC PERFORMANCE.

3 Eg where a covenant in restraint of trade is secured by a penalty or liquidated damages: *Hardy v Martin* (1783) 1 Cox Eq Cas 26; *Fox v Scard* (1863) 33 Beav 327; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; and see *Barret v Blagrove* (1800) 5 Ves 555; *Bird v Lake* (1863) 1 Hem & M 111; *Howard v Woodward* (1864) 34 LJ Ch 47; *Jones v Heavens* (1877) 4 ChD 636. Similarly, as to restrictive covenants affecting land, see *Coles v Sims* (1854) 5 De GM & G 1.

4 *Sainter v Ferguson* (1849) 1 Mac & G 286; *Carnes v Nesbitt* (1862) 7 H & N 778; *Fox v Scard* (1863) 33 Beav 327; *Howard v Woodward* (1864) 34 LJ Ch 47; *Young v Chalkley* (1867) 16 LT 286; *General Accident Assurance Corp v Noel* [1902] 1 KB 377. As to damages generally see DAMAGES.

5 See *Roper v Bartholomew* (1823) 12 Price 797 at 821.

6 *French v Macale* (1842) 2 Dr & War 269 at 284.

7 *Woodward v Gyles* (1690) 2 Vern 119; *Legh v Lillie* (1860) 6 H & N 165. See also *Rolfe v Peterson* (1772) 2 Bro Parl Cas 436; and cf *French v Macale* (1842) 2 Dr & War 269 (where only a single sum per acre was reserved for breach of a covenant not to burn). It is now provided that under such a provision the landlord cannot recover more than a sum representing the damage he has actually suffered by reason of the breach: see the Agricultural Holdings Act 1986 s 24; and AGRICULTURAL LAND vol 1 (2008) PARA 331. On the other hand, where an increased rent was reserved upon breach of covenant against offensive trades, with a clause of re-entry on breach of covenant, this did not give the lessee the right to commit a breach, and the lessor had the option of re-entering or requiring payment of the increased rent (*Weston v Metropolitan Asylum District Managers* (1882) 9 QBD 404, CA); cf *Hanbury v Cundy* (1887) 58 LT 155 (lease of tied house with proviso for reduction of rent so long as the tie was observed; the lessee had not the option of breaking the tie and paying the full rent). Cf *Magrane v Archbold* (1813) 1 Dow 107, HL (covenant for perpetual renewal of a lease, subject to a penalty). As to the reservation of penal rents see AGRICULTURAL LAND vol 1 (2008) PARA 331; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 251.



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### **(viii) Covenants operating by way of Assignment or Release**

#### **273. Assignment of after-acquired property.**

A contract for valuable consideration, by which it is agreed to make a present transfer of property, if it is one of which a court will decree specific performance, passes the beneficial interest at once; or if the property does not then belong to the covenantor, the beneficial interest passes as soon as he acquires the property<sup>1</sup>. Similarly, a covenant to charge property when acquired operates as a charge on the property so soon as acquired<sup>2</sup>. An assignment for valuable consideration of property to be afterwards acquired by the assignor operates as a covenant by the assignor to assign it when acquired, and on acquisition the beneficial interest passes accordingly<sup>3</sup>. Provided that the property is ascertainable with certainty, it is no objection that it is described in general terms<sup>4</sup>. A clause in a building agreement that building materials brought on to the land are to become the property of the landowner does not, however, operate merely as an assignment. On the materials being brought on to the land the legal interest in them passes by virtue of the contract<sup>5</sup>.

1 *Holroyd v Marshall* (1862) 10 HL Cas 191; and see *Re Lind, Industrials Finance Syndicate Ltd v Lind*[1915] 2 Ch 345, CA; *Re Dent, ex p Trustee*[1923] 1 Ch 113; and cf *Shep Touch* 162. As to specific performance generally see SPECIFIC PERFORMANCE.

2 *Metcalfe v Archbishop of York* (1836) 1 My & Cr 547. It does not, however, so operate in favour of a volunteer, since the contract will not be specifically enforced: *Re Earl Lucan, Hardinge v Cobden*(1890) 45 ChD 470. A covenant which amounts only to a licence to seize or creates a mere right in contract must be distinguished from a covenant which creates an equitable charge: see *Collyer v Isaacs*(1881) 19 ChD 342, CA; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445.

3 *Re Lind, Industrials Finance Syndicate Ltd v Lind*[1915] 2 Ch 345, CA; *Re Gillott's Settlement, Chattock v Reid*[1934] Ch 97; *Re Warren, ex p Wheeler v Trustee in Bankruptcy*[1938] Ch 725, [1938] 2 All ER 331, DC; *Re Haynes Will Trusts, Pitt v Haynes*[1949] Ch 5, [1948] 2 All ER 423.

4 *Tailby v Official Receiver*(1888) 13 App Cas 523, HL (assignment of all book debts acquired during the continuance of the security), approving *Re Clarke, Coombe v Carter*(1887) 36 ChD 348, CA, and overruling *Belding v Read* (1865) 3 H & C 955 (personal effects to be thereafter upon a house) and *Re Count D'Epineuil (No 2) Tadman v D'Epineuil*(1882) 20 ChD 758 (charge on all 'present and future personalty'). See also *Re Kelcey, Tyson v Kelcey*[1899] 2 Ch 530; *Imperial Paper Mills of Canada v Quebec Bank* (1913) 83 LJC 67. As to covenants in marriage settlements for assignments of after-acquired property see *Lewis v Madocks* (1803) 8 Ves 150; *Hardey v Green* (1849) 12 Beav 182; *Re Reis, ex p Clough*[1904] 2 KB 769 at 777, CA; and SETTLEMENTS vol 42 (Reissue) PARA 636, 644 et seq. If the general words are too vague for the contract to be enforced, then it is divisible, and can be enforced as to the property sufficiently described: *Clements v Matthews*(1883) 11 QBD 808, CA; *Re Clarke, Coombe v Carter* supra; *Re Turcan*(1888) 40 ChD 5, CA. See also *Syrett v Egerton*[1957] 3 All ER 331, [1957] 1 WLR 1130, DC (income and estate charged, charge on income certain and effective); and see PARA 233 ante.

5 *Reeves v Barlow*(1884) 12 QBD 436, CA; *Hart v Porthgain Harbour Co Ltd*[1903] 1 Ch 690; cf *Morris v Delobel-Flipo*[1892] 2 Ch 352 (charge in favour of an agent on stock in his hands); *Re Keen and Keen, ex p Collins*[1902] 1 KB 555; *Re Weibking, ex p Ward*[1902] 1 KB 713. See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1643; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 86.



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#### **274. Covenant not to sue.**

A general covenant by a creditor with his debtor not to sue at any time will operate as a release of the debt. This is in order to avoid circuity of action, since the damages in an action on the covenant would be equal to the debt<sup>1</sup>. On the other hand, a covenant not to sue before a stated time does not operate as a release; it only gives the debtor a remedy on the covenant if he is sued before the time<sup>2</sup>. Moreover, a general covenant not to sue does not release the debt for all purposes, and the debt may be kept alive as between persons claiming under the debtor<sup>3</sup>; and where the parties to the covenant are different from the persons interested as debtors or creditors in the debt, then the principle of avoiding circuity of action does not apply, and the covenant does not operate as a release<sup>4</sup>.

1 *Ford v Beech* (1848) 11 QB 852 at 511, Ex Ch; *Smith v Mapleback* (1786) 1 Term Rep 441 at 446 per Buller J; and see the notes to *Fowell v Forrest* (1670) 2 Saund 47.

2 *Deux v Jefferies* (1594) Cro Eliz 352; *Thimbleby v Barron* (1838) 3 M & W 210; and see *Morley v Frear* (1830) 6 Bing 547.

3 *Ledger v Stanton* (1861) 2 John & H 687.

4 Thus a covenant with one of two joint debtors (*Hutton v Eyre* (1815) 6 Taunt 289), or joint and several debtors (*Lacy v Kinnaston* (1701) 1 Ld Raym 688 at 690; *Dean v Newhall* (1799) 8 Term Rep 168), not to sue him does not prevent an action being brought for the debt against the other debtor (cf *Salmon v Webb and Franklin* (1852) 3 HL Cas 510). With an actual release it is different, and a release to one of two joint, or joint and several, debtors releases both (Co Litt 232a; *Cheetham v Ward* (1797) 1 Bos & P 630; *Nicholson v Revill* (1836) 4 Ad & El 675 at 683); but not a release to one of two several debtors (*Collins v Prosser* (1823) 1 B & C 682). Where the release is accompanied by a reservation of rights against the co-debtor, its effect as a release is avoided by treating it as a covenant not to sue (*Solly v Forbes* (1820) 2 Brod & Bing 38; and see *Bateson v Gosling* (1871) LR 7 CP 9; *Keyes v Elkins* (1864) 5 B & S 240). See CONTRACT vol 9(1) (Reissue) PARAS 1052-1053. A covenant by one of several joint creditors not to sue the debtor does not discharge the debt due to the creditors jointly: *Walmesley v Cooper* (1839) 11 Ad & El 216.

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